TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 841

SUSAN G. REEVES, PETITIONER,

vs.

WILLIAM BEARDALL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF SUSAN J. GRAHAM, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 6, 1942.

CERTIORARI GRANTED FEBRUARY 9, 1942.

INDEX

INDEX—Continued

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

Civil Action, File Number 72—Orl. Civil.

SUSAN G. REEVES,

Plaintiff,

against

WILLIAM BEARDALL, as Executor of the Last Will and Testament of Susan J. Graham, deceased, and WILLIAM M. HAMER,

Defendants.

1

COMPLAINT.

Filed Jul. 12, 1940, Orlando, Fla.

1. Plaintiff is a citizen of the State of New Jersey and defendants are citizens of the State of Florida. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

Count I.

2. The late Susan J. Graham, the mother of the plaintiff and a resident of Orlando, Florida, on or about the 23rd day of November, 1927, executed and delivered to plaintiff a promissory note, dated November 23, 1927, a copy of which is hereto annexed as Exhibit A.

3. No payment has been made on account of said note or the interest thereon, and the amount of the note and the interest thereon have been since the date of said note and still are owing to plaintiff.

4. On or about the 15th day of April, 1940, the said Susan J. Graham, being the same person as Susan Jordan Graham, having died, plaintiff duly filed a proof of claim in a proceeding in the County Judge's Court of Orange County, Florida, in Probate entitled "In re Estate of Susan Jordan Graham, Deceased," a copy of which proof of claim is hereto annexed as Exhibit B, and said proof of claim was rejected by defendant William Beardall, the acting executor of the will of Susan J. Graham, deceased, on or about the 22nd day of May, 1940, a copy of said notice of rejection being hereto annexed as Exhibit C.

Count II.

5. The plaintiff repeats and realleges each and every allegation contained in paragraphs 2 and 3 of this complaint with the same force and effect as though herein again set forth in full.

6. On or about the 25th day of June, 1938, plaintiff and Susan J. Graham entered into a contract in writing, a copy of which is hereby annexed as Exhibit D.

7. In accordance with the provisions of said contract of June 25, 1938, plaintiff delivered to Susan J. Graham the securities set forth in Exhibit D and thereafter during the life of Susan J. Graham refrained from demanding or taking any steps to obtain payment of the note dated November 23, 1927, and interest thereon.

8. On or about the 1st day of May, 1931, Susan J. Graham made, published and declared as her last will and testament an instrument in writing, a copy of which is annexed hereto as Exhibit E, and said will had not been revoked or modified by her at the time of the execution of the contract of June 25, 1938, hereinabove referred to.

9. On or about the 16th day of June, 1939, Susan J. Graham, in violation of the terms of the said contract of June 25, 1938, made, published and declared as her last will and testament an instrument in writing, a copy of which is annexed hereto as Exhibit F.

10. On or about the 5th day of September, 1939, Susan J. Graham died at Orlando, Florida, being at that time a resident of Orange County, Florida, leaving plaintiff as her only surviving child.

11. On or about the 7th day of September, 1939, the County Judge's Court of Orange County, Florida, admitted to probate the will dated June 16, 1939, of which Exhibit F is a copy; and on or about the 7th day of September, 1939, William Beardall, one of the defendants herein, and named in said will as executor thereof, obtained and received letters testamentary by order of the County Judge of Orange County, Florida, and has not been removed or discharged as such executor.

12. On or about the 26th day of March, 1940, the said Susan J. Graham, being the same person as Susan Jordan Graham, having died, plaintiff duly filed a proof of claim in a proceeding in the County Judge's Court of Orange County, Florida, in Probate entitled "In re Estate of Susan Jordan Graham, Deceased", a copy of which proof of claim is hereto annexed as Exhibit G, and said proof of claim was rejected by the defendant William Beardall, as executor of the will of Susan J. Graham, deceased, on or about the 22nd day of May, 1940, a copy of his notice of rejection being hereto annexed as Exhibit H.

Count III.

13. The plaintiff repeats and realleges each and every allegation contained in paragraphs 5 to 12 inclusive of

this complaint with the same force and effect as though herein again set forth in full.

14. Susan J. Graham on or about the 1st day of April, 1929, delivered to defendant William M. Hamer who is the father-in-law of defendant William Beardall, the sum of $19,000. for the purposes and upon the terms set forth in a receipt delivered to her by William M. Hamer, a copy of which is annexed hereto as Exhibit I. On information and belief, Susan J. Graham entrusted and or delivered other and further monies and property to defendant William M. Hamer for purposes of investment, safe keeping for her account and or as a loan or loans to defendant William M. Hamer, and on information and belief defendant William M. Hamer has never returned to Susan J. Graham nor delivered to William Beardall, her executor as aforesaid, nor repaid to either of them the said sum of $19,000. or any other monies or property so entrusted or delivered to him or any part thereof, or any income therefrom, nor delivered to either of them any stocks, bonds or other securities or property purchased for Susan J. Graham with monies or property held for her, nor rendered any accounting of his disposition of any of said monies or property and the proceeds thereof and income therefrom although same has been duly demanded by plaintiff; and defendants have denied that there was any obligation owing by William M. Hamer to Susan J. Graham at the time of her death.

15. The assets comprising the estate of Susan J. Graham are substantially in excess of the sum of estate and other taxes, executor's commissions, all other expenses of administration, and all debts of Susan J. Graham owed at the time of her decease other than the obligations owed by her to the plaintiff by reason of the breach by Susan J. Graham of her contract with the plaintiff of June 25, 1938.

16. By virtue of the said contract between plaintiff and Susan J. Graham dated June 25, 1938, and the breach thereof by Susan J. Graham, as herein above set forth, plaintiff is entitled to the entire net estate of Susan J. Graham, and the denial by the defendants that defendant William M. Hamer owes any obligation to Susan J. Graham and the refusal of the defendant William M. Hamer to account to plaintiff, as herein above set forth, are hindering and delaying the collection and receipt by plaintiff of the monies and property justly due to her.

Wherefore, plaintiff demands: (1) judgment against the defendant William Beardall as executor of the will of Susan J. Graham for the sum of fifteen thousand dollars ($15,000.) with interest thereon at the rate of five and one-half per cent. (5-½%) per annum from November 23, 1927; (2) that defendant be required specifically to perform the contract of June 25, 1938, by holding in trust to pay over to the plaintiff the assets of the estate of Susan J. Graham remaining on hand and in his possession after the payment of debts, taxes and due and proper expenses of administration; (3) that if specific performance is not granted, plaintiff have judgment against the defendant William Beardall as such executor for damages in the sum equivalent to the net assets of the estate of Susan J. Graham remaining in the hands of the defendant William Beardall after the payment of debts, taxes and due and proper expenses of administration; (4) that the Court order and direct the defendant William M. Hamer to render a complete and full account of his acts and proceedings with respect to all monies, stocks, bonds, securities and other property, real or personal, received by the defendant William M. Hamer from or for the account of Susan J. Graham; (5) in the event it shall appear from an account or accounts rendered by defendant William M. Hamer that there now is any money or other property owing, that he be ordered to pay over the same to the plaintiff and

that the plaintiff have judgment against him for the full amount thereof together with interest; (6) that the plaintiff have such other and further relief as to the Court may seem just and proper; and (7) that plaintiff have judgment against the defendants for costs.

(Signed) WILLIAM N. ELLIS,
Attorney for Plaintiff.

(Address) Orlando, Florida.

BURKE & BURKE,
Of counsel for Plaintiff.

72 Wall Street,
Borough of Manhattan,
New York, N. Y.

By JAMES B. BURKE.

7 EXHIBIT A.

$15,000. Summit, N. J. November 23, 1927.

On demand, for value received, I, the undersigned, promise to pay to the order of Susie Graham Reeves, at Hobart Avenue, Summit, N. J., Fifteen Thousand Dollars ($15,000.) in United States gold coin or its equivalent, with interest from the date hereof, at the rate of five and one-half per centum per annum, having deposited with the said Susie Graham Reeves as collateral security for the payment of this note, or any note given in extension or renewal thereof, the following property owned by the undersigned; viz:

Two Hundred fifty 250) shares of the common stock of The Hunter Manufacturing and Commission Company.

On the non-performance of this promise, full power and authority is hereby given the said Susie Graham Reeves to sell, assign, transfer and deliver the whole of said

securities, or any part thereof, or any substitutes therefor or any additions thereto, at public or private sale, at such prices as she may deem best, and either for cash or on credit, or for future delivery, at the option of said Susie Graham Reeves, upon thirty days notice to the undersigned of the time and place of such sale, and if such collateral is disposed of at private sale, the said Susie Graham Reeves shall be relieved from all liability or claim for inadequacy of price. In case of sale for any cause, after deducting all expenses of any kind for collection, sale or delivery the said Susie Graham Reeves shall return the overplus, if any, to the undersigned, who agrees to be and remain liable to, and to pay the said Susie Graham Reeves for any deficiency arising upon such sale or sales. It is also agreed that the provisions, agreements, terms and conditions hereof shall apply to, and govern any and all notes given in extension or renewal of this note.

The above described property may from time to time by mutual consent, be exchanged for other property, which shall be held by said Susie Graham Reeves subject to all the terms of this note.

SUSAN J. GRAHAM.

9 EXHIBIT B.

In the County Judge's Court for Orange County, Florida, In Probate.

In Re: The Estate of Susan Jordan Graham, Deceased.

Proof of Claim.

Comes now Susie Graham Reeves, whose place of residence and post office address is Hobart Avenue, Summit,

New Jersey, who, having been by me, the undersigned officer, first duly sworn, says that the estate of Susan Jordan Graham, deceased, is justly indebted to her in the amount of $15,000. with interest thereon at the rate of 5-½% from November 23, 1927. For that on or about the 23rd day of November, A. D. 1927, the decedent, Susan Jordan Graham, for a valuable consideration, executed and delivered to this Claimant a demand promissory note in the amount of $15,000. with interst at the rate of 5-½% per annum, no part of which has been paid. A true copy of the said note is annexed hereto and made a part hereof as Claimant's Exhibit "A", to which reference is prayed as often as may be necessary. Also annexed hereto and made a part hereof as Claimant's Exhibit "B", to which reference is prayed as often as may be necessary, is a true copy of a certain contract, dated the 25th day of June, A. D. 1938, executed by the decedent, Susan Jordan Graham, in which the said decedent acknowledged that the said debt evidenced by the said note was still due and owing.

That this Claimant has heretofore surrendered and delivered to the decedent the collateral security held by this Claimant for the faithful performance by the decedent of her obligations under the said note.

That by reason thereof this Claimant has been damaged and files this her Proof of Claim against the said estate of Susan Jordan Graham, deceased, and demands payment of said sum of $15,000. with interest thereon at the rate of 5-½% from November 23rd, 1927, to date of payment.

Dated this 12th day of April, 1940.

S. G. R., SUSIE GRAHAM REEVES.

Sworn to before me this 12 day of Apr., 1940.
(Seal) THEODORE MUCHMORE.

My Commission Expires Feb. 17, 1942.

Note: Exhibits A and B herein referred to are identical to Exhibits A and D respectively of the complaint.

11

EXHIBIT C.

In the County Judge's Court, Orlando County, Florida.
In Re: Estate of Susan Jordan Graham, Deceased.

Objections to Claim of Susie Graham Reeves.

Now comes William Beardall, as executor in the above entitled estate, and files this his objection to the claim of Susie Graham Reeves, filed herein on April 15th, 1940, in the amount of $15,000.00, with interest at the rate of 5-½% from November 23rd, 1927, and all sums claimed thereon, based on promissory note attached to the claim and marked Exhibit "A", and dated Summit, N. J., November 23rd, 1927, and purports on its face to be payable on demand, on the following grounds:

1. Said claim is barred by the statute of limitations.

2. Said note has been paid prior to the death of the said Susan Jordan Graham.

3. Said note has been satisfied and discharged by mutual agreement between the said claimant and Susan Jordan Graham prior to the death of the said Susan Jordan Graham.

4. Susan Jordan Graham did not execute the supposed receipt "Exhibit B".

5. The signature of the said Susan Jordan Graham to Exhibit "B" attached to the claim was obtained by misrepresentations, she being a very old land and her grandson, Richard Reeves, in whom she had great confidence, procured her to sign said document without her reading it, telling her it was merely a receipt, he being in a great hurry and rush, and rushing the said Susan Jordan Graham, and she signed same without knowing what was in it, and with no intention of acknowledging that she owed claimants any sum of money whatsoever.

6. The Exhibit "B" attached to proof of claim does not identify the indebtedness referred to.

Wherefore the executor objects to the allowance of said claim.

WM. BEARDALL,
Executor.
C. P. DICKINSON,
Attorney for Executor.

EXHIBIT D.

June 25, 1938.

Dear Susie:

This is to acknowledge receipt from you of the following securities, which Richard has today delivered to me:

Clf. No.	Number of Shares or Principal Amount	Security.
49	400	Riverdale Mills preferred stock.
50	44	Riverdale Mills preferred stock.
46	45	Riverdale Mills preferred stock.
112	$10,000.	Eastern Offices, Inc., 7% Gold Note.
	10,000.	Eastern Offices, Inc., 7% Gold Note.
324	$1,000.	Eastern Offices, Inc., 7% Gold Note.
325	$1,000.	Eastern Offices, Inc., 7% Gold Note.
326	$1,000.	Eastern Offices, Inc., 7% Gold Note.
327	$1,000.	Eastern Offices, Inc., 7% Gold Note.
328	$1,000.	Eastern Offices, Inc., 7% Gold Note.
307	$2,000.	Summit Title and Mortgage Guaranty Co., 1st Mtg. Participation Bond.
366499K	$1,000.	U. S. Treasury Bond.

Ctf. No.	Number of Shares or Principal Amount	Security.
	$1,000.	2nd Mtg. Income Bond of Arizona Edison Company, Inc.
	$1,000.	2nd Mtg. Income Bond of Arizona Edison Company, Inc.
	$1,000.	2nd Mtg. Income Bond of Arizona Edison Company, Inc.
M2260	$1,000.	Northern Pacific Ry. Co. 5's of 2047.
1659	$1,000.	Northern Pacific Ry. Co. 5's of 2047.
36	$1,000.	Northern Pacific Ry. Co. 5's of 2047.
4949	$1,000.	Northern Pacific Ry. Co. 5's of 2047.
4947	$1,000.	Northern Pacific Ry. Co. 5's of 2047.
4948	$1,000.	Northern Pacific Ry. Co. 5's of 2047.
35	$1,000.	Northern Pacific Ry. Co. 5's of 2047.
1660	$1,000.	Northern Pacific Ry. Co. 5's of 2047.
4945	$1,000.	Northern Pacific Ry. Co. 5's of 2047.
4946	$1,000.	Northern Pacific Ry. Co. 5's of 2047.
EN32258	3 sha.	American Tel. & Tel. Co. Common stock.
AN53634	13 sha.	American Tel. & Tel. Co. Common stock.
RN80308	10 sha.	American Tel. & Tel. Co. Common stock.
NY011501	20 sha.	Electric Bond and Share preferred stock.
83399	20 sha.	Consolidated Gas Company of New York preferred stock.
WTF225,594	10 sha.	F. W. Woolworth Company common stock.
0519385	50 sha.	Texas Corporation common stock.

Ctf. No.	Number of Shares or Principal Amount	Security.
0517650	30 sha.	Texas Corporation common stock.
0656191	13 sha.	Texas Corporation common stock.
C125456	50 sha.	Standard Oil Company of New Jersey capital stock.
078603	11 sha.	Drug Incorporated common stock.
C0593	15 sha.	The Reinsurance Corporation of New York common stock.
023953	2 sha.	Mission Corporation common stock.
60	250 sha.	Eastern Offices, Inc., common stock.
7	25 sha.	Southern Cotton Mills.
TNC 02005	55 sha.	United States Stores Corporation common stock.
SC803	750 3000 sha.	United States Stores Corporation common stock.
TNC02000	1 sha.	United States Stores Corporation common stock.
C0129680	50 sha.	Standard Brands Incorporated common stock.
321958	10 sha.	Atchison, Topeka & Santa Fe Ry. Co. common stock.

I have had a talk with Richard about my affairs and our relations, and I have in mind my present obligation to you on the note in your favor for $15,000. and interest, which I signed several years ago, and which is now past due. He tells me that you have no intention of asking me to pay this note right now, but since I still owe this obligation, I am writing to state that in consideration of your not asking for payment of my obligation right now and in consideration of the delivery of the securities mentioned above to me and of your assistance in having cared for these securities and placed in my account at The Summit Trust Company all the income which I have received from them during the past several years, I shall hold these securities and not make any disposition of them without first telling you and obtaining your written advice and consent.

As I think you know, I executed my Will on May 1, 1931. I have not changed my Will since then, and in further consideration of your delivery of the securities listed above to me and your willingness not to ask for payment of the note at the present time, I agree not to make any disposition of my property by Will or otherwise contrary to the provisions of my Will of May 1, 1931, without your written approval, and to execute such further Will or Codicil as might from time to time be necessary to accomplish this purpose.

I understand that with the foregoing agreement on my part you are turning over all my securities to me and that you have indicated your assent to our understanding as set forth by signing this letter and a copy thereof. To evidence my consent to the agreement as set forth, I am also signing an original and copy of this letter and delivering the original to Richard to take back to you.

I have asked Richard to stamp on the securities a legend covering this understanding between us.

SUSAN J. GRAHAM.

Witness:

RICHARD E. REEVES.

The foregoing constitutes my agreement with my mother as to the delivery of these securities to her.

SUSIE GRAHAM REEVES.

Witness:

M. R. REEVES.

16 EXHIBIT E.

In the Name of God, Amen:

I, Susan J. Graham, of Orlando, Florida, being of sound and disposing mind and memory, do hereby make, publish, and declare this instrument as and for my Last Will and Testament as follows:

First: I order and direct that all my just debts, including taxes upon real property and funeral expenses, be paid as soon as may be convenient after my decease.—

Second: I give and bequeath to my beloved daughter, Susie Graham Reeves, of Summit, New Jersey, absolutely and forever, all my jewelry, watches, personal ornaments, wearing apparel, silver and silverware, books, pictures, objects of art, musical instruments, furniture, and all other articles of household and personal use, automobiles and accessories thereof, horses, carriages and appurtenances.—

Third: One-half of all the rest, residue and remainder of my estate of whatsoever nature and wheresoever situate, including any property over which I have any power

of appointment, I give, devise, and bequeath to my beloved daughter, Susie Graham Reeves, her heirs and assigns, absolutely and forever; and in the event that my said daughter shall have predeceased me, I give the said one-half rest, residue, and remainder of my estate to my granddaughter, Susan Robertson Reeves, her heirs and assigns, absolutely and forever, and in the event that both my said daughter and my said granddaughter shall have predeceased me, then I give the said one-half rest, residue, and remainder of my estate to such person or persons, their heirs and assigns, as would then be the heirs at law of my said daughter, under the laws of the State of New Jersey, in such parts, shares, and proportions as they would inherit as such heirs at law.—

Fourth: If my beloved son, Allen J. Graham, shall survive me, I give, devise, and bequeath the remaining one-half portion of all the said rest, residue, and remainder of my estate to my Trustee hereinafter named, In Trust Nevertheless, upon the following terms and conditions:—

To enter upon, take, hold, manage, invest, and reinvest said one-half portion of the rest, residue, and remainder of my estate, and to collect and receive the income, rents, issues, and profits thereof, and to dispose of the same as follows:

a. To hold the said one-half portion in trust for my said son, Allen J. Graham, and to pay over the net annual income therefrom in quarter-annual payments, together with all accumulations, to my said son for and during the term of his natural life; and I authorize and empower my Trustee hereinafter named to apply all or any part of the principal of said one-half portion to the support and maintenance of my son, if in the sole discretion of my Trustee such application of the principal of the said one-half portion is necessary or advisable;—

b. Upon the death of my said son to pay over the principal of the said one-half portion as the same shall then be to my beloved daughter, Susie Graham Reeves, absolutely and forever, and in the event that my said daughter shall survive me but shall have predeceased my said son, to pay over the principal of the said one-half portion to my granddaughter, Susan Robertson Reeves, absolutely and forever, and in the event that both my said daughter and my said granddaughter shall have predeceased my said son, then to pay over the principal of said one-half portion to such person or persons, their heirs and assigns, as would then be the heirs at law of my said daughter, under the laws of the State of New Jersey, in such parts, shares, and proportions as they would inherit as such heirs at law.—

Fifth: In the event that my said son, Allen J. Graham, shall have predeceased me I give, devise, and bequeath the said remaining one-half portion of all the rest, residue and remainder of my estate to my daughter, Susie Graham Reeves, her heirs and assigns, absolutely and forever; and in the event that she shall have predeceased me, then I give, devise, and bequeath said one-half portion to my granddaughter, Susan Robertson Reeves, her heirs and assigns, absolutely and forever, and in the event that both my said daughter and my said granddaughter shall have predeceased me, then and in that event I give, devise, and bequeath the same to such person or persons, their heirs and assigns, as would at the date of my death be the heirs at law of my daughter, Susie Graham Reeves, under the laws of the State of New Jersey, and in such parts, shares, and proportions as they would inherit as such heirs at law.—

Sixth: I authorize and empower my Executor and Trustee hereinafter named to continue to hold any real or personal property of which I may die possessed, whether

the same be legal for the investment of trust funds or not, for such time as she shall determine to be wise in her full discretion, with full power to vote in person or by proxy upon any stocks or votable securities, and to protect, by the expenditure of income or other capital moneys belonging to the trust, or by joining in any reorganization plan, or by exchange, or otherwise, any stocks, bonds or other securities of any nature so held by her, but upon all reinvestments it is my will that my said Executor and Trustee shall invest in such securities as are legal for the investment of trust funds under the laws of the State of New York. I authorize and empower my said Executor and Trustee to defend any proceedings of any nature as she may deem necessary or proper in connection with any matter relating to my estate or the trust hereby created, and to compromise, settle, and adjust any and all claims, judgments and causes of action in favor of or adverse to my estate or the trust estate herein established, and in any way relating thereto, whether or not such compromise may involve the payment by her of moneys out of the income or principal of my estate or the trust property; to execute all documents whether under seal or otherwise, and to do all acts and things, either personally or by agents, delegates or attorneys which she may deem necessary or proper in the execution of the duties of the trust, hereby created.

Seventh: I hereby direct my said Trustee to treat, as between any life tenant and remainderman, all investments as being made at the actual price at which such investments shall have been purchased or made, neither allowing for premiums on the one hand nor discounts on the other, but paying all actual income directly to those entitled to receive income and making no division thereof as between them and the remaindermen. I further direct that all cash dividends shall be regarded and treated as income and that all stocks or scrip dividends or rights to

subscribe for stock shall be regarded and treated as principal.—

Eighth: I direct that any legacy, succession, inheritance, transfer or estate tax that may be lawfully imposed by any State or other legal authority upon any bequest or devise herein, or any transfer thereof, be paid out of the residue of my estate and that the same shall not be chargeable to or paid by any division or legatee named herein except as residuary legatees or devisees may be affected thereby.—

Ninth: I nominate and appoint my daughter, Susie Graham Reeves, of Summit, New Jersey, as the sole Executor of and Trustee under this my Last Will and Testament, and I direct that no bond or surety shall be required of her as such Executor and/or Trustee. In the event that my said daughter shall predecease me or fail to qualify as such Executor and/or Trustee, I nominate and appoint my grandson, Richard Early Reeves, of Summit, New Jersey, and The Central Farmers Trust Company of West Palm Beach, Florida, Executors of and Trustees under this my Will with the same powers as I have given to my said daughter as such Executor and Trustee, and I direct that no bond or surety shall be required of them or either of them as such Executor and Trustee.—

Tenth: I hereby revoke all other Wills and Codicils by me heretofore made.—

In Witness Whereof I, the said Susan J. Graham, have hereunto set my hand and seal at the City of New York, State of New York, this 1st day of May, One Thousand Nine Hundred Thirty-One.

SUSAN J. GRAHAM, (L. S.)

Witnesses:

DANIEL BURKE,
JOHN H. SCHMID,
JAMES BUNDY BURKE.

The foregoing instrument, consisting of three typewritten pages, including this page, was on the 1st day of May, 1931, at the City of New York, State of New York, sealed, subscribed at the end, published and declared in the presence of each of us by the Testatrix, Susan J. Graham, to be her Last Will and Testament, and at the same time we and each of us at the request of said Testatrix, in her presence, and in the presence of one another, after hearing this attestation clause read aloud in an audible tone of voice, hereunto subscribed our names and places of residence as attesting witnesses at the end of the Will.

Daniel Burke, residing at Oxford Chenango Co. N. Y.

John H. Schmid, residing at 45 Elston Road, Upper Montclair, N. J.

James Bundy Burke, residing at Oxford, Chenango Co., N. Y.

19 EXHIBIT F.

Last Will and Testament.

In the Name of God, Amen:

I, Susan Jordan Graham, of the City of Orlando, County of Orange and State of Florida, which I hereby declare to be my place of legal domicile, after long and careful thought, free from the influence of any person or persons, whomsoever, Do Hereby Make, Publish And Declare this as and for my Last Will And Testament.

First: I direct the payment of my just debts, including my funeral expenses and the costs of a suitable marker

for my grave, as soon after my death as may be practicable.

Second: For reasons made known to those most directly interested and concerned more than one year prior to the date of this Will, I Do Hereby Revoke and Make Null And Void any and all former Wills and testamentary dispositions by me made, including especially that certain Will bearing my signature and dated May 1, 1931, which was executed without my full knowledge of its provisions and contents.

Third: All of my property and estate of whatsoever kind and character and wheresoever situated of which I may die seized or possessed or to which I may be in any manner justly entitled at the time of my death, I Give, Devise And Bequeath to Wm. Beardall, As Trustee,—to be had and held by him in trust for a period of ten (10) years from the date of my death, for the following uses and purposes and none others, namely:

(a) In trust, to hold, manage and control the same, to collect all the rents, issues, income and profits therefrom; to pay all taxes, insurance charges, necessary repairs and all other proper expenses connected therewith, with full power, from time to time, to sell, mortgage, lease or otherwise dispose of any part or all of my property and estate, as in his best judgment and discretion it may be expedient and advantageous to do, and to execute and deliver proper conveyances and such other instruments as may be necessary for the purposes aforesaid, without liability upon the part of any purchaser or mortgagee to see to the application of the said purchase or mortgage money. All proceeds of any sale or sales of my property to be reinvested from time to time as judiciously, advantageously and securely as my said Trustee may be able to do. In general, my said Trustee shall have every pow-

er and authority over my trust estate that he would have if he were the absolute owner thereof and the enumeration of specific powers shall not be taken to restrict the general powers and authority herein given, and the decision of my said Trustee shall be final and not subject to question by any beneficiary of the trust hereby created.

(b). In further trust to pay over, at the end of said Ten (10) years, whatever remains of my said trust estate and the accruals thereto, if any, to my grand-daughter, Susan Graham Reeves and my grand-son, C. E. Graham Reeves, of Summit, New Jersey, share and share alike, and no part of said trust estate to be at any time or in any manner subject to the payment of any indebtedness of my said grand-daughter and said grandson, whether existing at the time of my death or arising subsequently, either wholly or as to any part thereof, or to any assignment, conveyance, mortgage, pledge, legal process against her or him or any other form of alienation by them, voluntary or involuntary.

(c) In the event of the death of either one of my said grand-children before my death or before the distribution of my estate under the terms of this trust, the share he or she would have taken shall go to his or her children, or if there be no children, then to the survivor of my said grand-children named herein.

(d) In the event that both of my said grand-children named herein shall die before my death or before the distribution of my estate under the terms of this trust, leaving no children or issue of children, then and in that event, my trust estate shall go to such of my grand-children who may be living at that time.

Fourth: I hereby instruct my Executor or Trustee, as the case may be, that the purported contract or claim

which my daughter, Susan Graham Reeves, or her children pretend to have is absolutely Null And Void and obtained through fraud, deceit and surprise, and without consideration; and my said daughter and her attorneys and those interested have been so advised, and I have placed in my Attorney's hands all the evidence and papers necessary to refute said purported contract or claim.

(a) If my said daughter or any of my grand-children, or any of the cestui que trust under this Will should press or attempt to enforce the said purported contract or claim, or shall contest the validity of this my Will, or attempt to vacate the same or alter or change any of the provisions, or hinder, delay or embarrass my Executor or Trustee in carrying out the other provisions of this my Will, he or she or they shall be entitled deprived of any beneficial interest under this Will and of any share of my estate, and the share or shares of such person or persons shall be disposed of by my Executor or Trustee, as the case may be, in fee simple, either by sale, outright gift or otherwise, to whom he may wish or think worthy, but not to himself, free and discharged from this trust.

(b) If there shall be any attempt made to contest this Will or violate any of the conditions set out in sub-paragraph (a), above, then I authorize and direct my Executor or Trustee, as the case may be, to resist such attempt or violation and to pay the expense thereof out of my general estate or trust fund; but none of the expense of those so contesting this Will shall be paid out of my estate.

Fifth: I hereby nominate and appoint Wm. Beardall, to be the Trustee of this my last Will and Testament. I hereby nominate and appoint Wm. Beardall to be the Executor of this my last will and testament, and I hereby give to him and invest him with such powers over and

such title to and such interest in my entire estate and every portion thereof as it may be desirable or convenient for him to have for the Complete Execution Of This, My Will.

(a) I further direct and request that no bond shall be required of my said Executor and Trustee in any jurisdiction in which he may be called upon to qualify or act.

(b) Upon the acceptance and qualifying as my Executor and as my Trustee by Wm. Beardall, it is my desire and order that he name, within five (5) days, such a one as he may elect to serve as his successor executor and trustee, in the event he becomes incapacitated, unwilling or unable to serve. This right, authority and privilege in pre-naming his successor shall extend to and be binding in the same manner on all successor executors and trustees so appointed, and all successor executors and trustees so appointed shall have full power and authority to carry out all of the terms and conditions of this my Last Will and Testament..

Sixth: I direct that my Executor, Wm. Beardall, and his successors shall receive as compensation for his services Five percent (5%) of the appraised valuation of my estate and as compensation for the services as Trustee, he shall receive Three percent (3%) of the gross annual income collected by him, which compensation shall in no event be less than One Hundred Dollars ($100.00) per month, and such compensation shall be a charge upon the income as well as upon the corpus of my estate.

Seventh: It is my request that my Executor and Trustee associate with himself one (1) and not more than two (2) persons, in whom he has confidence, for the purpose of advice and the protection of his name in the handling

and settlement of my estate. Such associates shall be subject, by written notice, to removal by him at any time of they should decline to act or in his judgment prove objectionable. Those persons so elected shall receive as compensation for their services Two percent (2%) of the appraised value of my estate and Two percent (2%) of the gross annual income of my trust estate so long as they shall so act.

In Witness Whereof, I, Susan Jordan Graham, have hereunto set my hand and subscribed my name to this my Last Will and Testament, containing five (5) typewritten sheets of paper, written on one side, each bearing on the margin my signature; on this 16th day of June A. D. 1939.

(Seal) SUSAN JORDAN GRAHAM.

The preceding instrument, consisting of this and four (4) other tyewritten pages, each signed in the magin by the testator, was on the day of the date thereof subscribed by Susan Jordan Graham, the testator therein named, in our presence, who thereupon declared the same to be her Last Will And Testament and requested us to become witnesses thereto, whereupon we, in her presence and in the presence of each other subscribed our names thereto as witnesses.

C. G. GRIDLEY,
Address: Orlando, Florida.
HENRY J. WILDER,
Address: Orlando, Florida.
RANDOLPH H. COBB,
Address: Orlando, Florida.

24 EXHIBIT G.

In the County Judge's Court, for Orange County, Florida.

In Probate.

In Re: The Estate of Susan Jordan Graham, Deceased.

Proof of Claim.

Comes now Susie Graham Reeves, whose place of residence and post office address is Hobart Avenue, Summit, New Jersey, who, having been by me, the undersigned officer, first duly sworn, says that the estate of Susan Jordan Graham, deceased, is justly indebted to her to the full extent of the net assets thereof. For that, on or about the 25th day of June, A. D. 1938 the decedent, Susan Jordan Graham, for a valuable consideration, entered into a certain contract or agreement with the undersigned claimant, Susie Graham Reeves, under the terms and conditions of which the said Susan Jordan Graham expressly stipulated and agreed, among other things, not to change the provisions of her Last Will and Testament previously and on May 1st, 1931 by her executed, and then in effect. A true copy of the said contract is annexed hereto and made a part hereof as Claimant's Exhibit "A", to which reference is prayed as often as may be necessary. Also annexed hereto and made a part hereof as Claimant's Exhibit "B", to which reference is prayed as often as may be necessary, is a true copy of the said Last Will and Testament of the said Susan Jordan Graham, deceased, dated May 1st, 1931, which is the said Last Will and Testament referred to in the said contract attached hereto as Claimant's Exhibit "A".

That at the time of the decedent's death her son, Allen J. Graham, referred to in the said Last Will and Testa-

ment of May 1st, 1931, was not living; so that pursuant to the provisions of the Last Will and Testament this claimant, Susie Graham Reeves, would have been entitled to receive the entire estate of the decedent.

That on or about the 16th day of June, 1939, in violation of the said contract of June 25th, 1938, the said decedent, without this complainant's written approval, executed a new Last Will and Testament in which she made no provision or provisions for this claimant, but on the contrary expressly attempted to revoke and annul the said Last Will and Testament of May 1st, 1931. That the said Will of June 16th, 1939 has been admitted to probate in the County Judge's Court for Orange County, Florida, and one William Beardall of Orlando, Florida, has been duly appointed and has qualified as Executor thereunder.

That because of the breach of the said contract of June 25th, 1938 by the said Susan Jordan Graham, deceased, this claimant has been damaged by the loss of the entire net estate of the said decedent, for which the estate of the said decedent is liable, and for which this claimant files this her Proof of Claim against the said estate of Susan Jordan Graham, deceased, and demands that the assets of the said estate remaining on hand and in the possession of the said Executor after the payment of debts, reasonable costs, taxes and expenses of administration, be delivered to this claimant pursuant to the terms and provisions of the contract herein referred to and the Last Will and Testament of May 1st, 1931, to which the said contract had reference.

Dated this 16th day of March, A. D. 1940.

SUSIE GRAHAM REEVES.

Sworn to and subscribed before me this 16th day of March, A. D. 1940.

THOS. J. TEDDER,
Notary Public.

Note: Exhibits A and B herein referred to are identical to Exhibits D and E respectively of the complaint.

EXHIBIT H.

In the County Judge's Court, in and for Orange County, Florida. In Probate.

In Re: The Estate of Susan Jordan Graham, Deceased.

Objections to Claim of Susie Graham Reeves.

Now comes William Beardall, as executor in the above entitled estate, and objects to the claim of Susie Graham Reeves filed herein on the 26th day of March, 1940, wherein the said Susie Graham Reeves claims the entire estate of Susan Jordan Graham, because of a certain alleged contract dated the 25th day of June, 1938, wherein it is claimed that the said Susan Jordan Graham had agreed not to change a certain will, dated May 1st, 1931, under which the said Susie Graham Reeves now claims she would succeed to the entire estate of Susan Jordan Graham, and that in making the will probated in this cause, the said Susan Jordan Graham violated said contract, and the executor objects to said claim because:

1. Same is not a just and valid claim.

2. The contract on which the said claim is based is null and void and illegal and not supported by any consideration.

3. That said contract was procured by one Richard Reeves, son of Susie Reeves, at the instance of said Susie Graham Reeves, by a fraud, covin and deceit, wherein the said Susan Jordan Graham was lead to believe, by

false and fraudulent statements made by the said Richard Reeves, to sign her name to said document that same was nothing more than a receipt for the property referred to therein, and the said Susan Jordan Graham being at that time a very old lady, approximately 75 years of age, and who placed implicit trust and confidence in the said Richard Reeves, who was her grandson and whom she idolized.

That Susan Jordan Graham in her lifetime was not indebted to or obligated to or liable in any manner whatsoever to claimant Susie Graham Reeves in any sum whatsoever, on any account.

WM. BEARDALL,
As Executor of the Estate of
Susan Jordan Graham.
C. P. DICKINSON,
Attorney for Executor.

29 EXHIBIT I.

Orlando, Fla. April 1st, 1929.

Receipt.

Received of Mrs. Susan J. Graham her check drawn on Orlando Bank & Trust Company in amount of nineteen thousand dollars for investment for her account. In duplicate.

WM. M. HAMER.
(Wm. M. Hamer)

30 SUMMONS ISSUED 7/12/40 AND MARSHAL'S RETURN THEREON, omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * * * * * *

MOTION TO DISMISS AS TO COUNT No. II.

32 Filed Aug. 3, 1940, Orlando, Fla.

(Title Omitted.)

Defendant William Beardall, as executor, moves to dismiss Count No. II because:

1. There was no consideration for the agreement numbered Exhibit D. and made a part of Count II.

2. Under the statute of the State of Florida any person is authorized to revoke a will at any time by express provision of statute and the contract was therefore null and void.

3. There was no mutuality in the contract referred to as Exhibit D.

4. There is no showing that Susan G. Reeves is entitled alone to attack the execution by Susan J. Graham of her last will and testament dated the 16th of June, 1939.

5. Count No. II does not show any valid subsisting agreement entered into by and between plaintiff and Susan J. Graham so as to prevent her, the said Susan J. Graham, from executing a will at any time and revoking any and all former wills, including the will dated the 1st of May, 1931.

6. It appears on the face of the pleadings in Count No. II that there are other parties interested in the will of Susan J. Graham of May 1, 1931, and they are not parties to this proceeding.

7. The alleged contract attached as Exhibit D is too uncertain and indefinite for specific performance.

8. The alleged contract attached and made a part of this count is so uncertain and indefinite that the Court could not frame an appropriate decree thereon for purposes for which same is sought to be used.

9. The proceedings under this count are in effect nothing more than a suit to set aside and cancel the will of Susan J. Graham probated in the Probate Court, Orange County, Florida, and this Court has no jurisdiction of such proceedings as a matter of procedure or substantive law.

10. Plaintiff is not entitled to recover damages against the estate of Susan J. Graham for executing the will of June, 1939, and plaintiff has not shown nor alleged any state of facts authorizing the recovery of damages by plaintiff against the estate of Susan J. Graham.

---

34 MOTION TO DISMISS AS TO COUNT III.

Defendant William Beardall, as executor, moves to dismiss as to Count III of the complaint because:

1. There was no consideration for the agreement numbered Exhibit D, and made a part of Count II.

2. Under the statute of the State of Florida any person is authorized to revoke a will at any time by express provision of statute and the contract was therefore null and void.

3. There was no mutuality in the contract referred to as Exhibit D.

4. There is no showing that Susan G. Reeves is entitled alone to attack the execution by Susan J. Graham of her last will and testament dated the 16th of June, 1939.

5. Count No. III does not show any valid subsisting agreement entered into by and between plaintiff and Susan J. Graham so as to prevent her, the said Susan J. Graham, from executing a will at any time and revoking any and all former wills, including the will dated the 1st of May, 1931.

6. It appears on the face of the pleadings in Count No. III that there are other parties interested in the will of Susan J. Graham of May 1, 1931, and they are not parties to this proceeding.

7. Susan G. Reeves has not stated such a cause as shows her to be entitled to the entire estate of Susan J. Graham.

8. Same shows on its face that the alleged contract was without any mutuality or consideration whatsoever.

9. The alleged contract attached as Exhibit D is too uncertain and indefinite for specific performance.

10. The alleged contract attached and made a part of this count is so uncertain and indefinite that the Court would not frame an appropriate decree thereon for purposes for which same is sought to be used.

11. The proceedings under this count are in effect nothing more than a suit to set aside and cancel the will of Susan J. Graham, probated in the Probate Court, Orange County, Florida, and this Court has no jurisdiction of such proceedings as a matter of procedure or substantive law.

12. Plaintiff is not entitled to recover damages against the estate of Susan J. Graham for executing the will of June, 1939, and plaintiff has not shown nor alleged any state of facts authorizing the recovery of damages by plaintiff against the estate of Susan J. Graham.

(Signed) C. P. DICKINSON,
Attorney for Defendant William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, Deceased.

Proof of Service.

State of Florida,
County of Orange.

C. P. Dickinson, being first duly sworn, says that he deposited on the 3 day of August, 1940, a true copy of the foregoing Motion to Dismiss in the Post Office at Orlando, Florida, in an envelope securely sealed, bearing sufficient postage to cover mailing charges, and addressed to Mr. William N. Ellis, Attorney at Law, Orlando, Florida, who is the attorney for the plaintiff in the above entitled cause.

(Signed) C. P. DICKINSON.

Sworn to and subscribed before me this 3rd day of August, 1940.

BETTY GUERNSEY,
(Notarial Seal) Notary Public, State of Florida.

My Commission Expires: Jan. 6, 1941.

ORDER ON MOTION TO DISMISS AS TO WILLIAM BEARDALL AS EXECUTOR.

36 Filed Dec. 5, 1940, Orlando, Fla.

Orl. C. O. B. 1-424.

(Title Omitted.)

On hearing this day held after notice to counsel and argument on the motion of William Beardall as executor, to dismiss the complaint as to counts two and three:

It is Ordered and Adjudged that the motion of defendant William Beardall as Executor to counts two and three to dismiss said counts be, and the same is hereby sustained.

Plaintiff is allowed until the first Monday in January, 1941, to amend as to said counts two and three as to William Beardall as executor as she sees fit.

On the failure of plaintiff to amend said counts two and three as to William Beardall as executor within the time herein stated, this cause shall stand dismissed with prejudice as to said counts two and three as to William Beardall as executor and final judgment entered therein in his favor.

Done and Ordered this December 4, 1940.

(Signed) ALEXANDER AKERMAN,
District Judge.

37 MOTION FOR REHEARING.

Filed Dec. 14, 1940, Orlando, Fla.

(Title Omitted.)

Comes now the Plaintiff by William N. Ellis and James B. Burke, her solicitors, and would show unto this Honorable Court that on December 4th, 1940, after argument by counsel, two certain orders were entered by this Court sustaining defendants' Motions to Dismiss the complaint as to William M. Hamer and to dismiss counts two (2) and three (3) of the said Complaint as to William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, deceased. Plaintiff would further show that there was error of law in entering the said orders in that the Court did not take into consideration the following principles of law:

1. As to the defendant William M. Hamer the Complaint shows that the plaintiff is claiming the entire net estate and not just a portion thereof and that under such circumstances, the personal representative of the said estate is not a necessary party, nor under such circumstances is it necessary to make demand upon the personal representative to collect the claim alleged to be due the estate, nor to show circumstances such as would make demand upon the personal representative a futile gesture.

2. As to the defendant William Beardall, as Executor and so forth, and the order dismissing the second and third counts of the Complaint, the plaintiff would show that the contract in question shows on its face a valid consideration inuring to the benefit of the decedent Susan J. Graham, to-wit: Forbearance on the part of the plaintiff to demand payment of the promissory note in

question; and consideration inuring to the benefit of the plaintiff, to-wit: The agreement of the deceased not to change an existing will; that the consideration on the part of the plaintiff had been completely performed, under which circumstances the agreement of the deceased will be enforced.

Plaintiff would further show that a material question of law was not considered by the Court in finding that plaintiff's forbearance to sue or to demand payment was not for a stated length of time, whereas plaintiff would show that the weight of authority is to the effect that forbearance to sue or to demand payment for an unstated time is presumed to mean a reasonable time.

Wherefore plaintiff would show that the said contract was supported by a mutual valid consideration, completely executed by plaintiff and that plaintiff's agreement to forbear was an agreement to forbear for a reasonable time.

Wherefore, for the said errors of law committed plaintiff respectfully prays that she be granted a rehearing in said cause.

WILLIAM N. ELLIS,
JAMES BURKE,
Solicitors for Plaintiffs.

State of Florida,
County of Orange.

On this day personally appeared before me, the undersigned authority, William N. Ellis, who having been by me first duly sworn, deposes and says:

1. That he is of counsel for the plaintiff in the foregoing cause; and

2. That the matters and things set forth in the foregoing Motion are true.

WILLIAM N. ELLIS.

Subscribed and sworn to before me this 14th day of December, A. D. 1940.

CORA LEE CUMBIE
(NEE BEASLEY),
Notary Public, State of
Florida at Large.

(Notarial Seal)

My Commission Expires July 5, 1941.

---

40 NOTICE OF HEARING.

(Title Omitted.)

To: Hon. C. P. Dickinson, Attorney for Defendant William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, Deceased, and Hon. Hugh Akerman, Attorney for Defendant William M. Hamer, Orlando, Florida:

You will please take notice that on Tuesday, December 17th, A. D. 1940, at ten o'clock (10:00) in the forenoon, I shall apply to the Honorable Alexander Akerman, in his chamers at Orlando, Florida, for a hearing in the above entitled cause. A copy of said Motion is hereto attached.

Dated this 14th day of December, A. D. 1940.

WILLIAM N. ELLIS,
Attorney for Plaintiff.

We hereby acknowledge receipt of a true copy of the foregoing Notice and Motion this 14 day of December, A. D. 1940.

C. P. DICKINSON,
Attorney for Defendant William Beardall, as Executor, etc.

HUGH AKERMAN,
Attorney for Defendant William M. Hamer.

---

41 AMENDMENTS TO COMPLAINT.

Filed Jan. 13, 1941, Orlando, Fla.

(Title Omitted.)

Comes now the Plaintiff by her attorneys of record pursuant to the Order of Court heretofore entered and amends her original Complaint as herein filed in the following particulars, to-wit:

Amendment to Count II.

Plaintiff amends Count II of the original Complaint by omitting paragraph six (6) of the said Count appearing on page two (2) and in lieu thereof alleges:

6. That on or about the 25th day of June, 1938, for valuable considerations mutually received, plaintiff and Susan J. Graham entered into a contract in writing, a copy of which is hereto annexed as Exhibit D. While no date was specifically stated in this contract to define an exact limit of time during which the plaintiff was to for-

bear suit, the plaintiff and Susan J. Graham intended by this contract to create an obligation on the part of the plaintiff not to press for payment by Susan J. Graham of the said note (Exhibit A) so long as Susan J. Graham did not change her will or sell her securities without the consent of the plaintiff, and it was their mutual understanding that such was the meaning and purport of the terms of the contract (Exhibit D) as executed. These mutual obligations and the considerations therefor as herein set forth were orally stated and agreed to by and between plaintiff and Susan J. Graham at the time of the execution of the contract (Exhibit D).

The Exhibits referred to are those annexed to the original Complaint.

Amendment to Count III.

Plaintiff amends Count III by adding to paragraph fourteen (14) immediately following the last sentence thereof, the following paragraph, to-wit:

While no formal demand has been made by plaintiff upon defendant Beardall to bring suit against defendant Hamer with regard to any obligation owing by him to the estate of the last Susan J. Graham or to those entitled to said estate by reason of the foregoing, the making of such formal demand by the plaintiff would have been futile for the following reasons: Defendant William Beardall has permitted the limitation for administering the estate to expire without taking any action against defendant William M. Hamer; he has refused the plaintiff's request to demand an explanation or accounting from William M. Hamer as to the latter's financial relations with Susan J. Graham or to accompany one of the plaintiff's attorneys to William M. Hamer's office for the purpose of discussing the matter; he has refused to show to plaintiff's attorneys any statements covering the

financial relations between Susan J. Graham and defendant William M. Hamer although not denying their existence and has refused to divulge any information as to or reason for his refusal to recognize the existence or possible existence of any debt or obligation due by defendant William M. Hamer to the estate of the late Susan J. Graham or to those entitled thereto; and, furthermore, at conferences with the attorneys for the plaintiff he has stated that any suggestion of such obligation owing by William M. Hamer is altogether unfounded, vehemently and indignantly denying the existence thereof and adopting an attitude of almost personal affront that such suggestions were made with regard to his father-in-law.

The exhibits referred to are those annexed to the original Complaint.

Plaintiff further amends her complaint by omitting the fifth (5th) prayer appearing at the bottom of page five (5) and adding in lieu thereof the following prayer, to-wit:

(5) In the event it shall appear from an account or accounts rendered by defendant William M. Hamer that there now is any money or other property owing, that he be ordered to pay over the same to the plaintiff or to the Executor in trust for the plaintiff, and that judgment be entered against the said William M. Hamer for the full amount thereof, together with interest thereon.

(Signed) WILLIAM N. ELLIS,
Attorney for Plaintiff.

(Address)
Orlando, Florida.

BURKE & BURKE,
Of Counsel for Plaintiff,
By JAMES BURKE.

72 Wall Street,
Borough of Manhattan,
New York, N. Y.

Received copy of the foregoing Amendment this 13th day of January, A. D. 1941.

.....,
Attorney for Defendant William Beardall, as Executor, etc.
HUGH AKERMAN,
Attorney for Defendant William M. Ha ..er.

MOTION TO STRIKE AMENDMENT TO COUNT TWO.

45 Filed Jan. 21, 1941, Orlando, Fla.

(Title Omitted.)

The defendant, William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, deceased, by counsel moves the Court to strike amendment to Count Two filed herein on the following grounds:

1. The matter set up therein is immaterial, redundant and irrelevant to the issues in the case.

2. Same attempts to set up only the construction placed on the contract referred to by the plaintiff.

3. Same is merely the conclusions of plaintiff as to the meaning and understanding on her part of the contract.

4. Same constitutes only an argument.

Further Motion.

And this defendant further moves the Court to strike all of the amendment to Count Two filed herein except

the first sentence separately and assigns the same grounds as above set out for striking the whole amendment.

C. P. DICKINSON,
Attorney for Defendant
William Beardall.

Mezzanine-Annex to O. B. & T. Building,
Orlando, Florida.

MOTION No. TWO.

MOTION FOR MORE DEFINITE STATEMENT.

46 Filed Jan. 21, 1941, Orlando, Fla.

(Title Omitted.)

The defendant, William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, deceased, moves the Court to require the plaintiff to furnish a more definite statement as to the valuable considerations mutually received stated in the first sentence of said amendment, and assigns the following grounds:

1. The defendant is not in a position to controvert any fact in reference to the valuable considerations mutually received referred to in said first sentence of the said amendment.

2. That plaintiff be required to state exactly what was the valuable consideration which Susan J. Graham received from plaintiff.

3. That the plaintiff be required to state exactly what was the valuable consideration passing from Susan J. Graham to Susan Graham Reeves referred to in the amendment to Count Two.

4. Defendant is unable to determine whether or not plaintiff relies on the considerations stated in the alleged contract or whether or not there were other considerations passing as a basis for the contract.

This motion is made by defendant because the considerations referred to are not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial.

C. P. DICKINSON,
Attorney for Defendant
William Beardall.
Mezzanine-Annex to O. B. & T. Building.
Orlando, Florida.

THIRD MOTION.

MOTION TO DISMISS COUNT TWO OF THE COMPLAINT AS AMENDED BY AMENDMENT FILED HEREIN.

48 Filed Jan. 21, 1941, Orlando, Fla.

(Title Omitted.)

Defendant William Beardall, as Executor of the last will and testament of Susan J. Graham, deceased, moves the Court to dismiss the complaint as amended as to Count Two and assigns the following grounds:

1. There was no consideration for the agreement numbered Exhibit D, and made a part of Count II.

2. There was no mutuality in the contract referred to as Exhibit D.

3. There is no showing that Susan G. Reeves is entitled alone to attack the execution by Susan J. Graham of her last will and testament dated the 16th of June, 1939.

4. Count No. II does not show any valid subsisting agreement entered into by and between plaintiff and Susan J. Graham so as to prevent her, the said Susan J. Graham, from executing a will at any time and revoking any and all former wills, including the will dated the 1st of May, 1931.

5. It appears on the face of the pleadings in Count No. II that there are other parties interested in the will of Susan J. Graham of May 1, 1931, and they are not parties to this proceeding.

6. The alleged contract attached as Exhibit D is too uncertain and indefinite for specific performance.

7. The alleged contract attached and made a part of this count is so uncertain and indefinite that the Court could not frame an appropriate decree thereon for purposes for which same is sought to be used.

8. Plaintiff is not entitled to recover damages against the estate of Susan J. Graham for executing the will of June, 1939, and plaintiff has not shown nor alleged any state of facts authorizing the recovery of damages by plaintiff against the estate of Susan J. Graham.

9. Said Count Two fails to state a claim upon which relief can be granted against this defendant.

10. That part of Count Two contained in the amendment merely states the construction of the contract placed

thereon by the plaintiff and seeks to lay a foundation for introduction to parol testimony to vary the terms of the contract in writing.

11. Nothing can be added to or taken from the contract on which the action is based and the contract will govern and control alone the rights of the parties.

12. Count Two is inconsistent and repugnant in that it alleges by the amendment that same was entered into for valuable considerations mutually received by the plaintiff and Susan J. Graham, whereas the contract shows no consideration.

C. P. DICKINSON,
Attorney for Defendant
William Beardall.

Mezzanine-Annex to O. B. & T. Building,
Orlando, Florida.

---

50 ORDER OF COURT.

Filed Feb. 26, 1941, Orlando, Fla.

Orl. C. O. B. 1-462.

(Title Omitted.)

After notice to counsel and argument before the Court by counsel for the respective parties of the motion of defendant William Beardall as executor of the estate of Susan J. Graham, deceased, to strike plaintiff's amendment to Count II of the complaint,

It is Ordered that defendant's motion be, and the same is hereby granted and plaintiff's amendment to Count II

of the original complaint wherein paragraph six was omitted on page 2 and the part in the amendment was substituted in place thereof, be, and the same is hereby stricken.

Plaintiff advised the Court at the hearing by counsel that she did not desire to amend.

Done and Ordered at Orlando, Florida, February 25, 1941.

ALEXANDER AKERMAN,
District Judge.

---

51 ORDER OF COURT:

Filed Feb. 26, 1941, Orlando, Fla.

Orl. C. O. B. 1-463.

(Title Omitted.)

The Court having heretofore, after notice and on hearing of counsel for the respective parties present, stricken plaintiff's amendment to Count Two of the complaint, and plaintiff by counsel announcing that she did not desire to amend further, and at the same hearing the cause came on before the Court on motion of defendant William Beardall, as executor, to dismiss the complaint as to Count Two, and as aforesaid the amendment to Count Two as to William Beardall, as executor, having been stricken,

It is Ordered that plaintiff's complaint as to Count Two be, and the same is hereby dismissed.

And plaintiff having announced by counsel that she did not desire to amend;

It is Ordered that final judgment be entered on Count Two of plaintiff's complaint in favor of defendant, William Beardall, as executor of the estate of Susan J. Graham.

Done and Ordered January 25, 1941.

ALEXANDER AKERMAN,
District Judge.

52

FINAL JUDGMENT.

Filed Feb. 26, 1941, Orlando, Fla.

Orl. C. O. B. 1-465.

In the District Court of the United States, for the Southern District of Florida.

Civil Action File No. 72 Orl.

Susan G. Reeves, Plaintiff,

vs.

William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, Deceased, and William M. Hamer, Defendants.

The Court heretofore having sustained motion of defendant William Beardall, as executor of the estate of Susan J. Graham, deceased, to dismiss plaintiff's complaint as to Count Two, and plaintiff having announced by counsel that she did not desire further to amend,

It is Ordered and Adjudged that this suit as set out in Count Two of plaintiff's complaint be, and the same is hereby dismissed as to William Beardall as executor of the estate of Susan J. Graham, deceased, and that the plaintiff Susan G. Reeves take nothing by her plaint, and that the defendant William Beardall, as executor of the estate of Susan J. Graham, deceased, as to plaintiff's claim set up in Count Two of her complaint, go hence without day.

Done and Ordered this, the 26th day of February, 1941.

ALEXANDER AKERMAN,
District Judge.

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

53 Filed Mar. 26, 1941, Orlando, Fla.

In the District Court of the United States of America, for the Southern District of Florida.

Susan G. Reeves, Plaintiff-Appellant,
against 72 Orl. Civil.
William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, Deceased, Defendant-Appellee.

Notice is hereby given that Susan G. Reeves, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the Order granting defendant Beardall's Motion to Strike Plaintiff's Amendment to Count II dated February 25th, 1941, and filed February 26th, 1941; from the Order dismissing Plaintiff's

complaint as to Count II and for entry of Final Judgment on Count II in favor of defendant Beardall dated February 25th, 1941, filed February 26th, 1941, and from the Final Judgment on Count II in favor of defendant Beardall, dated February 26, 1941, and filed in this action on February 26th, 1941.

Dated at Orlando, Florida, this 26 day of March, A. D. 1941.

WILLIAM N. ELLIS,
(William N. Ellis)

37 East Pine Street,
Orlando, Florida.

JAMES BURKE,
Of the Firm of Burke & Burke,
For the Appellant.

72 Wall Street,
New York City, New York.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

54 Filed Mar. 26, 1941, Orlando, Fla.

(Title Omitted.)

Comes now the Apellant and designates the following to be contained in the record on appeal:

1. Bill of Complaint filed July 12, 1940.

2. Summons and Return dated July 12, 1940, filed July 15, 1940.

3. Motion to dismiss as to Count II filed by the defendant Beardall on August 3, 1940,

4. Order on Motion to Dismiss as to William Beardall, as Executor, etc., filed December 5, 1940,

5. Motion for Rehearing filed December 14, 1940,

6. Amendment to Complaint filed January 13, 1941,

7. Defendant Beardall's Motion to Strike Amendment to Count II filed January 21, 1941,

8. Defendant Beardall's Motion for more definite statement filed January 21, 1941,

9. Defendant Beardall's Motion to Dismiss Count II of Complaint as amended, filed January 21, 1941,

10. Order granting Motion to Strike Plaintiff's Amendment to Count II, dated February 25, 1941, filed January 26, 1941,

11. Order Dismissing Plaintiff's Complaint as to Count II and for entry of Final Judgment on Count II in favor of defendant Beardall, dated February 25, 1941, and filed February 26, 1941,

12. Final Judgment on Count II in favor of defendant Beardall dated February 26, 1941, and filed February 26, 1941,

13. Notice of Appeal filed the 26 day of March, 1941,

14. This Designation of portion of the record to be included in the record on appeal.

WILLIAM N. ELLIS,
(William N. Ellis)

37 East Pine Street,
Orlando, Florida.

JAMES BURKE,
Of the Firm of Burke & Burke,
For the Appellant.

72 Wall Street,
New York City, New York.

We hereby acknowledge receipt of a true copy of the foregoing Designation of Contents of Record on Appeal, this 26 day of March, A. D. 1941.

C. P. DICKINSON,
Of the Firm of Dickinson & Dickinson,
For the Appellee.

Orlando, Florida.

STATEMENT OF POINTS ON WHICH APPELLANT RELIES.

56 Filed Apr. 5, 1941, Orlando, Fla.

(Title Omitted.)

On the appeal of the foregoing cause the appellant, Susan G. Reeves, relies upon the following points:

1. Count II of the complaint as amended states a good cause of action.

(a) The amendments are allegations of ultimate fact, do not vary the terms of the written agreement in question, and are proper allegations for the complaint.

2. Count II of the complaint states a good cause of action even though the amendments be stricken.

(a) A contract not to change a will is valid and enforceable and appellant may alone enforce the contract in question.

(b) The promise of the appellant in the agreement in question is consideration to support the counter-promise of Mrs. Graham so as to constitute the agreement a valid contract between appellant and Mrs. Graham.

(c) There are no other interested parties in the will of Susan J. Graham of May 1, 1931, who are necessary or proper parties to this proceeding.

(d) The contract of June 25, 1938, is not too uncertain for specific performance.

(e) There is mutuality.

WILLIAM N. ELLIS,
(William N. Ellis)

37 East Pine Street,
Orlando, Florida.

JAMES BURKE,
Of the Firm of Burke & Burke,
For the Appellant.

72 Wall Street,
New York City, N. Y.

We hereby acknowledge receipt of a true copy of the foregoing State of Points on Which Appellant Relies, this 5th day of April, 1941.

C. P. DICKINSON,
Of the Firm of Dickinson & Dickinson,
For the Appellee.

Orlando, Florida.

AMENDED DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

58 Filed Apr. 5, 1941, Orlando, Fla.

(Title Omitted.)

Comes now the Appellant and amends her Designation of Contents of Record on Appeal by requesting the Clerk to include in said record the Statement of Points on Which the Appellant Relies, filed on the 5th day of April, 1941.

WILLIAM N. ELLIS,
(William N. Ellis)

37 East Pine Street,
Orlando, Florida.

JAMES BURKE,
Of the Firm of Burke & Burke,
For the Appellant.

72 Wall Street,
New York, N. Y.

We hereby acknowledge receipt of a true copy of the foregoing Amended Designation of Contents of Record on Appeal, this 5th day of April, 1941.

C. P. DICKINSON,
Of the Firm of Dickinson & Dickinson,
For the Appellee.

Orlando, Florida.

59 CERTIFICATE OF CLERK.

United States of America,
Southern District of Florida.

I, EDWIN R. WILLIAMS, Clerk of the United States District Court in and for the Southern District of Florida, do hereby certify that the above and foregoing typewritten pages, numbered 1 to 58, inclusive, are true and correct copies of the proceedings had in the case of Susan G. Reeves, Plaintiff, vs. William Beardell, as Executor of the Last Will and Testament of Susan J. Graham, Deceased, No. 72-Orlando Civil, prepared in accordance with the directions of the attorneys herein, as the same appear in the files and records of this Court.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of this Court, this the 9th day of April, A. D. 1941.

EDWIN R. WILLIAMS,
Clerk,
(Seal) By WALTER A. DALEY,
Deputy Clerk.

[fol. 55] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 9900

SUSAN G. REEVES

versus

WILLIAM BEARDALL, as Executor of the Last will and Testament of Susan J. Graham, Deceased

ORDER DISMISSING CAUSE—October 7, 1941

This cause was this day called in its regular order;

Whereupon, it appearing to the Court that the appeal sued out in said cause was taken from a judgment that is not final;

It Is Ordered by this Court that said cause be, and it is hereby, Dismissed.

[fol. 56] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9900

[Title omitted]

PETITION FOR REHEARING—Filed October 22, 1941

This cause is an appeal from an order and judgment of the District Court of the United States for the Southern District of Florida striking the amendment to Count II of the plaintiff's complaint and dismissing Count II of the complaint. The case was called in its regular order for argument before this Court on the 7th day of October, 1941. Since answers have been filed to Counts I and III of the complaint and these counts are awaiting trial, this Court took the position that the judgment dismissing Count II was not final and it was ordered that this cause be dismissed.

[fol. 57] In support of the dismissal of the appeal Judge Foster referred to this Court's recent decision in *Huntcman* v. *New Orleans Public Service*, 119 F. (2d) 465, which involved a judgment dismissing a complaint as to one of

three defendants alleged to be *jointly liable on one cause of action*. Judge Foster also asked counsel if he could cite the decision of any Circuit Court of Appeals holding that the judgment appealed from in this case would be a final judgment from which an appeal to this Court would lie.

Because of the provisions of Rules 18 and 54 (b) (and related Rules 14-20) of the new Rules of Civil Procedure, counsel had not anticipated that any question would arise as to the finality of the judgment appealed from and was therefore unfortunately unable, at the moment, to refer to any decision in support of appellant's position. Now, however, after an opportunity for research we respectfully submit that the Circuit Court of Appeals for the Second Circuit in *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. (2d) 83 (1939), has held that a judgment dismissing *one of two separate and distinct causes of action between the same plaintiff and defendant* is a final judgment from which an appeal will lie. The doctrine of this case, derived from earlier Supreme Court decisions as affected by the new Rules, would appear also to have been accepted by the Circuit Courts of Appeals for the Fourth and Seventh Circuits. (See brief annexed for a discussion of these cases and their application to this appeal.) We have found no decision to the contrary by the Supreme Court or a Circuit Court of Appeals.

Since Circuit Courts of Appeals have taken the position that a judgment dismissing a separate cause of action is a final judgment (a situation not before this Court in the *Hunteman* case, *supra*), it is respectfully submitted that the judgment herein appealed from is a final judgment from which an appeal will lie and it is respectfully re-[fol. 58] quested that a rehearing be ordered and the appellant permitted to argue the appeal herein upon the merits.

Respectfully submitted, William N. Ellis, 37 Pine Street, Orlando, Florida; Burke & Burke, James B. Burke, 72 Wall Street, New York, New York, Attorneys for Appellant.

We, William N. Ellis and James B. Burke, the attorneys for the appellant herein, certify that the foregoing petition for rehearing is made in good faith and not for the purposes of delay.

Dated October 18, 1941.

William N. Ellis, James B. Burke, Attorneys for Appellant.

[fol. 59] I, C. P. Dickinson, attorney for the appellee, believing for the reasons stated in the Petition for Rehearing that the appeal taken herein by the appellant was from a final judgment, hereby join in the foregoing Petition for Rehearing and request that appellant's appeal be heard upon the merits.

Dated October 20, 1941.

C. P. Dickinson, Attorney for Appellee.

[fol. 60] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Rehearing—December 15, 1941

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] Supreme Court of the United States

Order Allowing Certiorari—Filed February 9, 1942

The petition herein of a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. [illegible]

SUSAN G. REEVES,

Petitioner,

v.

WILLIAM BEARDALL, as Executor of the Last Will and Testament of Susan J. Graham, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

DANIEL BURKE,
Counsel for Petitioner,
72 Wall Street,
New York, N. Y.

INDEX

TABLE OF CASES

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No.

SUSAN G. REEVES,

Petitioner,

v.

WILLIAM BEARDALL, as Executor of the Last Will and Testament of Susan J. Graham, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Susan G. Reeves, prays that a writ of certiorari issue to review the order of the Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled case on the 7th day of October, 1941 (R. 55), which dismissed the petitioner's appeal to that Court upon the basis that the appeal was taken from a judgment of the District Court of the United States for the Southern District of Florida which was not final.

Opinion Below

No opinion was rendered by the Circuit Court of Appeals other than the statement in the minutes of the Court for October 7, 1941, that the appeal was dismissed on the grounds that the judgment appealed from was not final (R. 55). No opinion was rendered by District Judge Hugh Akerman who signed the judgment of the District Court of the United States for the Southern District of Florida

from which the appeal was taken, and which judgment was in terms designated as a "final judgment" (R. 47-48).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended. No question is involved under the Constitution or Statutes of the United States, and the jurisdiction of the Courts below was based solely on diversity of citizenship.

Question Presented

The only question presented to this Court is whether the judgment of the United States District Court for the Southern District of Florida (R. 47-48) dismissing Count II of petitioner's complaint and directing that petitioner "go hence without day" as to said court was a final judgment from which an appeal could be taken to the Circuit Court of Appeals.

Statement

The petitioner's complaint contains three counts, viz: Count I, an action by the petitioner against the respondent Beardall on a promissory note; Count II, an action by the appellant against the respondent for specific performance of a promise not to change a will, or in the alternative for damages equal to the net value of the estate; and Count III, an action for an accounting against defendant Hamer (R. 1-6, 38-39). The two separate and distinct claims against the respondent were joined as independent claims under the provisions of Rule 18(a) of the new Rules of Civil Procedure. The claim against the defendant Hamer was included in the complaint under the provisions of Rule 18(b). Count I of the complaint involves the obligation of the respondent's testatrix on her promissory note. Count II of the complaint involves the validity of a contract between the petitioner and respondent's testatrix and the liability of the latter's estate for claimed breach of such contract. Separate transactions are involved and the relief sought as to each count is separate and distinct. Respondent filed an answer to Count I and moved to dismiss Count II (R.

43-45). (The answer to Count I was not included in the record before the Circuit Court of Appeals or in the record before this Court.) The motion to dismiss Count II was granted (R. 46-47), and a judgment designated as a "final judgment" dismissing Count II of the complaint was signed by the District Judge (R. 47-48).

An appeal from the "final judgment" of the District Court was taken to the United States Circuit Court of Appeals for the Fifth Circuit (R. 48-49) and when the appeal came on to be heard the United States Circuit Court of Appeals for the Fifth Circuit dismissed the appeal, without listening to argument on the merits, upon the basis that the appeal was from a judgment that was not final (R. 55). Petitioner filed a petition with the Circuit Court of Appeals for rehearing (R. 56-58), in which the attorney for the respondent joined (R. 59), as he too believed that the judgment appealed from was final and appealable. The petition for a rehearing was denied by the Circuit Court of Appeals without opinion (R. 60).

Error to be Urged

Petitioner urges that the Circuit Court of Appeals for the Fifth Circuit erred in holding that the judgment from which the appeal was taken was not final.

Reasons for Granting the Writ

In addition to the error which the petitioner urges was made by the Circuit Court of Appeals in dismissing the petition, the petitioner urges that her petition for writ of certiorari should be granted because the decision of the Circuit Court of Appeals for the Fifth Circuit in dismissing the appeal appears to be in flat contradiction to the principle of law set forth by the Circuit Court of Appeals for the Second Circuit in *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. (2d) 83 (1939). In that case the Circuit Court of Appeals for the Second Circuit held that a judgment dismissing one of two separate and distinct causes

of action between the same plaintiff and defendant was a final judgment from which an appeal did lie. The principle enunciated by the Circuit Court of Appeals for the Second Circuit appears also to have been accepted by the Circuit Court of Appeals for the Fourth Circuit in *Bowles v. Commercial Casualty Ins. Co.*, 107 F. (2d) 169 (1939), and by the Circuit Court of Appeals, Seventh Circuit, in *Florian v. U. S.*, 114 F. (2d) 990 (1940). It is respectfully submitted that the principles of appellate jurisdiction involved in the decision of the Circuit Court of Appeals for the Fifth Circuit in dismissing Count II of the petitioner's complaint should be reviewed and clarified by this Court in view of the apparent conflict between the decision of that Court and the decision of the other circuit courts of appeals mentioned above.

Returning to the question of the finality of the judgment in the District Court (R. 47-48) it is the position of the petitioner that since the Rules of Civil Procedure in Rule 18(a) permit joinder of independent claims and in Rule 54(b) provide for the entry of a judgment disposing of one among several claims at any stage in a proceeding, the judgment appealed from was a final judgment from which the appeal properly lay. That judgment completely disposed of the plaintiff's claim under Count II of the complaint without reference to any further action of the court below as to the other counts of the complaint.

While it was in the discretion of the District Court whether or not an order and judgment dismissing Count II should have been entered, it is respectfully submitted that by entering the order and judgment the Court did make a final disposition of Count II in the form of a final judgment from which an appeal would lie.

WHEREFORE, it is respectfully submitted that this petition should be granted.

SUSAN G. REEVES,
Petitioner,
By DANIEL BURKE,
Her Counsel.

BRIEF IN SUPPORT OF PETITION

The complaint herein contains three counts, viz.: Count I—an action by the appellant against the appellee Beardall on a promissory note; Count II—an action by the appellant against the appellee Beardall for specific performance of a contract not to change a will or, in the alternative, for damages equal to the net value of the estate; and Count III—an action for an accounting against defendant Hamer (R. 1-6, 38-39). The two separate and distinct claims against the appellee Beardall are joined as independent claims under the provisions of Rule 18. (a) of the new Rules of Civil Procedure. The claim against the defendant Hamer is included in the complaint under the provisions of Rule 18. (b).

Count I and Count II of the complaint involve entirely separate and unrelated transactions and the relief sought as to each count is separate and distinct. Before the distinction was abolished, one would have been an action at law and the other one an action in equity.

Rule 54 (b) of the Rules of Civil Procedure expressly provides that when more than one claim for relief is presented in an action the court may at any stage determine the issues as to a particular claim and enter a judgment disposing of that claim. This the lower court did in entering the judgment dismissing Count II of the appellant's complaint, which completely disposed of the controversy between the parties as to the alleged contract about the will (R. 47-48). For practical purposes the judgment of the court below effectively disposed of Count III, also, since any right of the appellant against the defendant Hamer depended upon complete success in maintaining the cause of action contained in Count II of the complaint. It is respectfully submitted that such a judgment is a final judgment from which an appeal to this Court will lie. *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. (2d) 83 (1939).

In the case just cited plaintiff sued the defendant for infringement of copyright and unfair competition arising from defendant's production of the motion picture "Test Pilot." The plaintiff claimed that the motion picture infringed the copyright of his book called "Test Pilot" and that the release of the picture was unfair competition, as he claimed that the title of the picture would deceive the public into believing that the picture was based on the book with the consent of the plaintiff. The Court granted the defendant's motion to dismiss the first cause of action on the grounds that it did not state facts sufficient to constitute a cause of action. The second cause of action was not then brought to trial and the plaintiff appealed from the order dismissing the first cause of action. The Circuit Court of Appeals for the Second Circuit expressly overruled its own earlier decision in *Sheppy* v. *Stevens*, 200 F. 946 (1912), and held that the appeal would lie. The Court took the position that with the unlimited joinder of claims between one plaintiff and one defendant authorized by Rule 18, courts must be granted extensive discretionary power to expedite the determination of the issues and avoid delay and inconvenience and that this was provided for by Rule 54 (b) conferring power on the courts to enter separate judgments at various stages. In its opinion (p. 85) the Court states:

> "They (the new Rules) indicate a definite policy to treat a judgment on a separate claim as so far final that it may be enforced by execution. It would clearly be held appealable if capable of immediate enforcement. * * * It seems unlikely that such a judgment, whether or not enforceable, is not to be regarded as final for purposes of appeal."

The concurring opinion of Judge Clark in the *Collins* case is most interesting in view of the leading part taken by him in the formulation of the new Rules.

In the case at bar the judgment dismissing Count II of the appellant's complaint completely ended the litigation

as far as concerned the cause of action for specific performance of or damages for the breach of the contract not to change a will. That cause of action was a separate and distinct cause of action not depending upon the other causes of action of the complaint.

In its opinion in *Collins* v. *Metro-Goldwyn Pictures Corp., supra* (p. 86), the Circuit Court of Appeals for the Second Circuit indicates that the District Judge must use his discretion in granting final judgments from which appeals may be taken so as not to force the Circuit Courts of Appeals to decide issues piecemeal, unless such disposition prevents undue delay. In the case at bar that discretion, it is respectfully submitted, was wisely exercised since the determination on appeal of the validity of the contract not to make a will, set forth in Count II of the complaint, will decide the one big issue which, when decided, will in all probability permit a settlement of all the controversies between the appellee and the appellant. While the appellant's cause of action on the promissory note in Count I involves a separate and distinct transaction and presents distinctly separable legal and factual problems, it is obvious that this cause of action would become of no importance if the appellant should be successful as to Count II, under which appellant claims to be entitled to the entire net estate of her mother because of the latter's contract not to change her former will which was in appellant's favor.

The Second Circuit is not alone in holding that a judgment completely disposing of one of several causes of action is a final judgment from which an appeal to this Court will lie. The Circuit Court of Appeals for the Fourth Circuit, in *Bowles* v. *Commercial Casualty Ins. Co.*, 107 F. (2d) 169 (1939), wholeheartedly endorsed the *Collins* case when it said (p. 170):

> "The better opinion seems to be that a judgment finally disposing of one cause of action is appealable although other causes of action are not disposed of. Collins v. Metro-Goldwyn Pictures Corp., 2 Cir., 106 F. 2d 83."

The *Collins* case has also been cited with approval by the Circuit Court of Appeals for the Seventh Circuit in *Florian* v. *U. S.*, 114 F. (2d) 990 (1940).

In addition to the error of the Circuit Court of Appeals for the Fifth Circuit in dismissing petitioner's appeal, we respectfully urge that a writ of certiorari be granted since there appears to be a square conflict between the decision of the Circuit Court of Appeals for the Fifth Circuit and the decision of the Circuit Court of Appeals for the Second Circuit in the *Collins* case, *supra*, which was endorsed by the Circuit Court of Appeals for the Fourth Circuit in the *Bowles* case, *supra*, and by the Circuit Court of Appeals for the Seventh Circuit in the *Florian* case, *supra*. The question of the finality of a judgment disposing of one of several causes of action is a question of general concern to the Bar as to which it is respectfully submitted the Bar might well have the benefit of a decision by this Court.

Respectfully submitted,

DANIEL BURKE,
72 Wall Street,
New York, N. Y.,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 841

SUSAN G. REEVES,

Petitioner,

vs.

WILLIAM BEARDALL, as Executor of the Last Will and Testament of Susan J. Graham, Deceased,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

DANIEL BURKE,
72 Wall Street,
New York, New York,
Counsel for Petitioner.

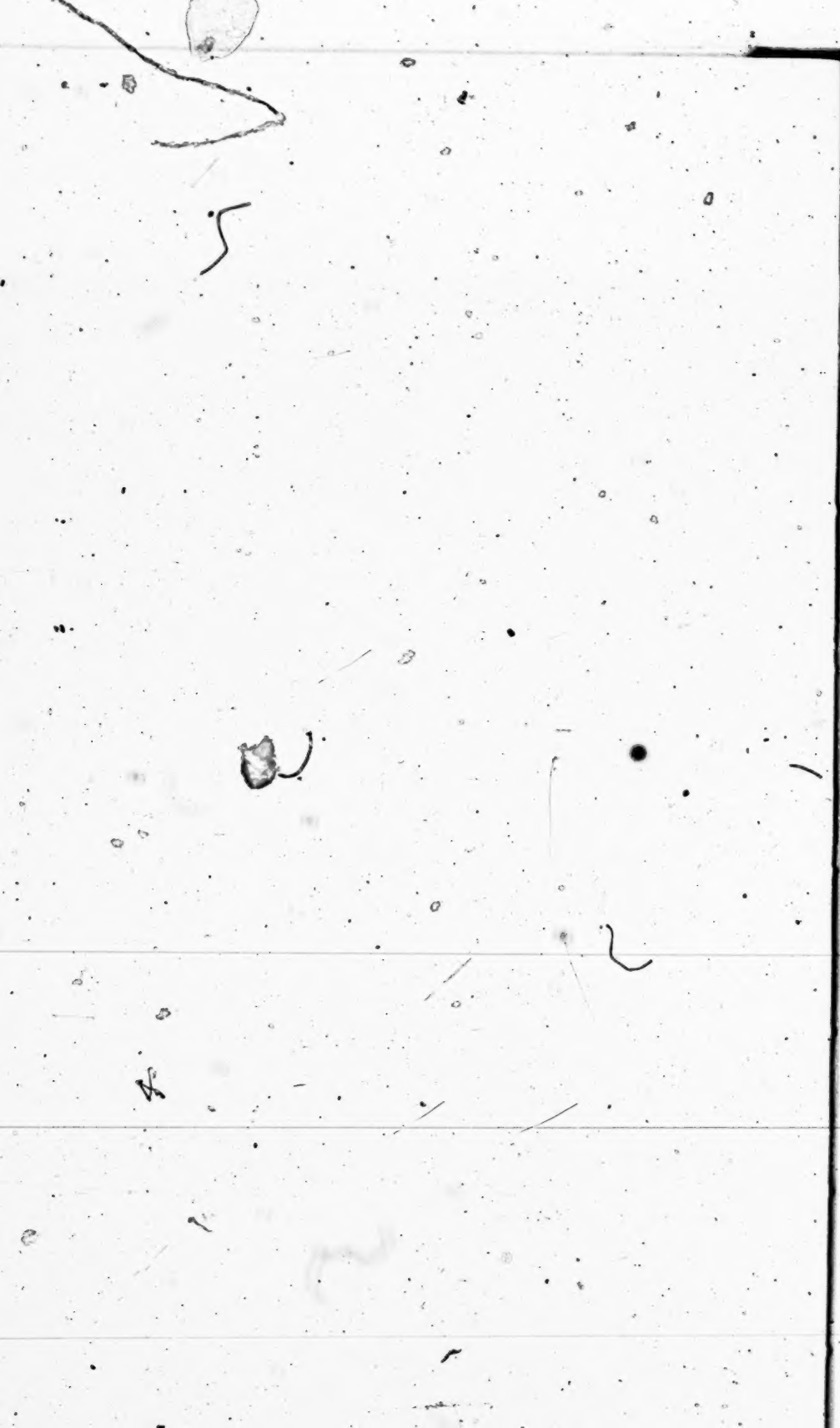
WILLIAM N. ELLIS,
37 East Pine Street,
Orlando, Florida,

JAMES B. BURKE,
72 Wall Street,
New York, N. Y.,
of Counsel.

INDEX

CASES CITED

STATUTES CITED



IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 841

SUSAN G. REEVES,

Petitioner,

vs.

WILLIAM BEARDALL, as Executor of the Last Will and Testament of Susan J. Graham, Deceased,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinions Below

No opinion was delivered by the Circuit Court of Appeals other than the statement in the minutes of the Court for October 7, 1941, that the appeal was dismissed on the grounds that the judgment appealed from was not final (R. 55). No opinion was delivered by District Judge Alexander Akerman, who signed the judgment of the United States District Court for the Southern District of Florida, from which the appeal to the Circuit Court of Appeals for the Fifth Circuit was taken and which judgment was in terms designated as a "final judgment" (R. 47-48).

The Jurisdiction of This Court

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended. No question is involved under the Constitution or statutes of the United States and the jurisdiction of the courts below was based solely on diversity of citizenship.

Question Presented

The only question presented to this Court is whether the judgment of the United States District Court for the Southern District of Florida (R. 47-48) dismissing Count II of petitioner's complaint and directing that petitioner "go hence without day" as to said count was a final decision from which an appeal could be taken to the Circuit Court of Appeals.

Statement

The petitioner's amended complaint contains three separate and distinct claims, viz.: Count I, a claim by the petitioner against the respondent Beardall on a promissory note; Count II, a claim by the petitioner against the respondent for specific performance of a promise not to change a will, or in the alternative for damages equal to the net value of the estate; and Count III, a claim by the petitioner against defendant Hamer for an accounting (R. 1-29, 38-39). The two separate and distinct claims against the respondent were joined as independent claims under the provisions of Rule 18(a) of the new Rules of Civil Procedure. The claim against the defendant Hamer was included in the complaint under the provisions of Rule 18(b). Separate transactions are involved and the relief sought in each count is separate and distinct. Respondent filed an answer to Count I and moved to dismiss Count II (R. 43-45). (The answer to Count I was not included in the record before the Circuit Court of Appeals or in the record before this Court.) The motion

to dismiss Count II was granted by an order directing that "final judgment" be entered in favor of the respondent as to this count (R. 46-47), and a judgment designated as a "final judgment" dismissing Count II of the complaint was signed by the District Judge and filed (R. 47-48) under Rule 54(b).

An appeal from the "final judgment" of the District Court was taken to the United States Circuit Court of Appeals for the Fifth Circuit (R. 48-49). When the appeal came on to be heard, the United States Circuit Court of Appeals for the Fifth Circuit dismissed the appeal, without listening to argument on the merits, upon the basis that the appeal was from a judgment that was not final (R. 55). Petitioner filed a petition with the Circuit Court of Appeals for rehearing (R. 55-57), in which the attorney for the respondent joined (R. 57), as he too believed that the judgment appealed from was final and appealable. The petition for a rehearing was denied by the Circuit Court of Appeals without opinion (R. 57). The Writ of Certiorari was granted on February 9, 1942; the respondent having also submitted a brief in support of the petition (R. 57).

Argument

As set forth above in the "Statement", we commence the consideration of the problems of law in this case with a complaint which includes three quite separate and distinct claims, the first two of which are against the respondent and the third against a defendant not a party to the proceedings in the Circuit Court of Appeals and this Court.

Rule 54(b) of the Rules of Civil Procedure reads as follows:

> "Where more than one claim for relief is presented in an action, the court at any stage, upon a determination

> of issues material to a particular claim * * * may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. * * * "

On the face of this language it would appear that this rule would permit the entry of a judgment final in form and substance; for what else can be the meaning of the words "judgment disposing of such claim" as used in the rule? It is respectfully submitted that the District Court followed this rule and entered a final and appealable judgment dismissing Count II of the petitioner's complaint, for this judgment completely disposed of the controversy between the parties as to the alleged contract with regard to the will (R. 47-48). Certainly no judgment could be more final in its terms than was the one entered by the District Court.

As to this question of the finality of the judgment and its proper foundation for an appeal to the Circuit Court of Appeals, the respondent is in complete accord with the petitioner. The respondent joined in the petition for a rehearing by the Circuit Court of Appeals (R. 57, fol. 59), and has already filed a brief with this Court in support of the petition for the Writ of Certiorari. In that brief in referring to the judgment the respondent's counsel stated (p. 3):

> "None of the attorneys can find anything else further to do in regard to Count 2, and the cause of action or claim therein set up."

The position taken by both petitioner and respondent as to the finality of the judgment appealed from has full support in the decisions of several of the Circuit Courts of Appeals. The leading case in this connection would appear to be *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. (2d) 83 (C. C. A. 2d, 1939).

In the case just cited plaintiff sued the defendant for infringement of copyright and unfair competition arising from defendant's production of the motion picture "Test Pilot". The plaintiff's complaint contained two causes of action or claims: (1) that the motion picture infringed the copyright of his book called "Test Pilot", and (2) that the release of the picture was unfair competition on the ground that the title of the picture would deceive the public into believing that the picture was based on the book with the consent of the plaintiff. The Court granted the defendant's motion to dismiss the first cause of action on the grounds that it did not state facts sufficient to constitute a cause of action. The second cause of action was not then brought to trial and the plaintiff appealed from the judgment dismissing the first cause of action. The Circuit Court of Appeals for the Second Circuit expressly overruled its own earlier decision in *Sheppy* v. *Stevens*, 200 F. 946 (1912), and held that the judgment dismissing the first cause of action was "final" and that the appeal would lie. The Court took the position that with the unlimited joinder of claims between one plaintiff and one defendant authorized by Rule 18, courts must be granted extensive discretionary power to expedite the determination of the issues and avoid delay and inconvenience, and that this was provided for by Rule 54(b) conferring power on the courts to enter separate judgments at various stages. In its opinion (p. 85) the Court states:

> "They (the new Rules) indicate a definite policy to treat a judgment on a separate claim as so far final that it may be enforced by execution. It would clearly be held appealable if capable of immediate enforcement. * * * It seems unlikely that such a judgment whether or not enforceable, is not to be regarded as final for purposes of appeal."

The concurring opinion of Judge Clark in the *Collins* case is most interesting in view of the leading part taken by him in the formulation of the new Rules.

In its opinion in *Collins* v. *Metro-Goldwyn Pictures Corp.*, *supra* (p. 86), the Circuit Court of Appeals for the Second Circuit indicates that the District Judge must use his discretion in granting final judgments from which appeals may be taken so as not to force the Circuit Courts of Appeals to decide issues piecemeal, unless such disposition prevents undue delay. In the case at bar that discretion, it is respectfully submitted, was wisely exercised since the determination by the Circuit Court of Appeals of the validity of the contract not to make a will, set forth in Count II of the complaint, will decide the one big issue which, when decided, will in all probability permit a settlement of all the controversies between the petitioner and the respondent. While the petitioner's claim on the promissory note in Count I involves a separate and distinct transaction and presents distinctly separable legal and factual problems, it is obvious that this claim would become of no importance if the petitioner should be successful as to Count II, under which she claims to be entitled to the entire net estate of her mother because of the latter's contract not to change her former will which was in petitioner's favor.

The Second Circuit is not alone in taking the position that a judgment completely disposing of one of several causes of action is a final judgment from which an appeal to this Court will lie. The Circuit Court of Appeals for the Fourth Circuit, in *Bowles* v. *Commercial Casualty Ins. Co.*, 107 F. (2d) 169 (1939), wholeheartedly endorsed the *Collins* case when it said (p. 170):

> "The better opinion seems to be that a judgment finally disposing of one cause of action is appealable although other causes of action are not disposed of. Collins v. Metro-Goldwyn Pictures Corp., 2 Cir., 106 F. 2d 83."

The *Collins* case has also been cited with approval by the Circuit Court of Appeals for the Seventh Circuit in *Florian* v. *U. S.*, 114 F. (2d) 990, 993 (1940).

In colloquy with counsel at the time the appeal was dismissed Judge Foster of the Circuit Court of Appeals for the Fifth Circuit referred to the case of *Hunteman* v. *New Orleans Public Service*, 119 F. (2d) 465 (C. C. A. 5th, 1941), decided last spring by that Court. It is respectfully submitted, however, that the Judge was wrong in thinking that that case was in point. Contrary to the case at bar, the *Hunteman* case involved only one cause of action against joint defendants, as is made clear from the language of the Court in its decision, wherein it is stated (p. 466):

> "By seeking a judgment in solido against several defendants charged to be jointly and concurrently negligent, we think appellant presented but one claim for determination between the parties."

In the case at bar there was not one claim between the parties, but two separate and distinct causes of action, each of which might have formed the basis for a separate suit and in each of which the plaintiff sought separate and distinct relief.

There is a distinction between the lack of finality of the kind of judgment appealed from in the *Hunteman* case and the finality of the judgments pursuant to Rule 54(b) appealed from in the *Collins* case and the case at bar. This is noted by Judge Clark in his concurring opinion in the *Collins* case (p. 87), *supra* (p. 5).

The plain language of Rules 18 and 54 of the Rules of Civil Procedure would seem to permit no other construction than that given to them by the *Collins* case, and the other cases cited which approve its doctrine (*supra*, pp. 5, 6). Furthermore, it seems to us that this is the common sense construction to be given to the Rules. If a plaintiff is to be permitted to join in one complaint against one defendant several distinct and unrelated claims, and if the trial court is given the right at any stage to enter a judgment disposing of one or more of such claims leaving the other claims for trial or subsequent disposi-

tion, then justice can best be speeded if such a judgment is considered a final judgment from which an appeal may be taken to a Circuit Court of Appeals. It might well be a matter of months or years before all of the issues in all of the claims joined in one complaint under Rule 18 were determined, and yet under the construction of the Circuit Court of Appeals below the appeal concerning the first matter disposed of by a judgment of a District Court would have to be suspended until such far distant time. Such a delay would not be conducive to an orderly procedure or the reasonably prompt disposition of litigated matters.

It is respectfully submitted that the judgment of the District Court below was a final decision from which an appeal to the Circuit Court of Appeals for the Fifth Circuit would lie and that the order of that Court should be reversed and the case remanded for petitioner's appeal to be heard in that Court on the merits.

Respectfully submitted,

DANIEL BURKE,
72 Wall Street,
New York, New York,
Counsel for Petitioner.

WILLIAM N. ELLIS,
37 East Pine Street,
Orlando, Florida,

JAMES B. BURKE,
72 Wall Street,
New York, N. Y.,

of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 841.

SUSAN G. REEVES, PETITIONER,

VS.

WILLIAM BEARDALL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF SUSAN J. GRAHAM, DECEASED, RESPONDENT.

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

CHARLES R. SCOTT,
Barnett National Bank Building,
Jacksonville, Florida,
Counsel for Respondents.

C. P. DICKINSON,
P. O. Box 752,
Orlando, Florida,
Of Counsel for Respondents.

TABLE OF CASES

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 841.

SUSAN G. REEVES, PETITIONER,

VS.

WILLIAM BEARDALL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF SUSAN J. GRAHAM, DECEASED, RESPONDENT.

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

A reference to the record in this case exhibiting the complaint, pages one to six and exhibits following, and amendment to count 2, page 38, and the final judgment, page 47, will disclose that the complaint exhibited three separate distinct and independent claims:

First count on promissory note a common law action; second count, a suit for specific performance of a contract to make a will or not to change a will based on a contract, separate and distinct from the promissory note; third count, an accounting from an individual not in any

way connected with the defendant in counts 1 and 2. Therefore, each of these claims is separate and distinct.

Under the old practice the cause of action in count 1 would have been at common law triable by jury and could not have been joined in the same suit with the claim in counts 2 and 3.

Under the old procedure the cause of action in count 2 is strictly an equity action and could not have been joined with count 1 or count 3.

Under the old procedure count 3 is strictly an equity action and could not have been joined in the same suit with count 2 and count 1 or with either of them.

Therefore, solely by virtue of Rule 18, Rules of Civil Procedure, was it permissible to join these three separate and distinct independent claims. There is probably some question of the right under Rule 18 or any other rule of Rules of Civil Procedure to maintain the third count, but that is immaterial to this proceeding.

By virtue of Rule 54, Rules of Civil Procedure, it distinctly provided:

> "The court, at any stage upon the determination of issues material to a particular claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims."

We now turn to Section 230, Title 28, United States Code Annotated, and we find the statute providing that three months are allowed for application for appeal after the entry of judgment or decree and review of same by the Circuit Court of Appeals.

It has been held uniformly that the statute is mandatory and jurisdictional and it has likewise been uniformly held that the time cannot be extended by any court.

Now this rule 54 means what it says or it doesn't mean what it says. If the judgment in the case at bar terminated the action with respect to the claim in Count 2, then the time for taking an appeal from that judgment would expire three months from the date of the entry of the judgment, and it seems plain that it is mandatory on the part of the aggrieved party that he must assert his right of appeal within the three months when judgment is entered under this rule, or he will be barred.

We concur with the petitioner in the brief filed in support of the petition and the authorities therein cited.

The decision in the Circuit Court of Appeals, Fifth Circuit, simply dismissed the appeal on the ground that the appeal sued out in said cause was taken from a judgment that is not final (Page 55, transcript of record).

None of the attorneys can find anything else further to do in regard to Count 2, and the cause of action or claim therein set up. The final judgment (page 47 and 48 of transcript) is a final disposition of that count and the claim therein alleged, the language being:

> "That this suit, as set out in Count 2 of plaintiff's complaint, be, and the same is hereby, dismissed as to William Beardall, etc., and that plaintiff Susan G. Reeves take nothing by her plaint and that the defendant, etc., go hence without day."

This is both an equity decree and a judgment at law.

Apparently the Circuit Court of Appeals, Fifth Circuit, had in mind its opinion in the case of *Hunteman v. New Orleans Public Service, Inc., et al.*; 119 F. 2d 465, where it dismissed an unlike case where two parties had been sued in the same count on the same cause of action and it dismissed an appeal because the case hadn't been finally disposed of as to the other parties. This case was not brought nor governed by Rules 18 and 54 or any other rules of Civil Procedure as to joinder of parties, cause of actions or the entry of final judgment.

It thus appears that the action of the Circuit Court of Appeals is directly in conflict with decisions of other Circuit Courts of Appeal as cited in the brief of petitioner and brings this case within the provisions of paragraph 5, rule 38 of this court, Subdivision B, in these particulars:

1. The Circuit Court of Appeals has rendered a decision in conflict with a decision of another Circuit Court of Appeals on the same subject matter.

2. It has decided an important question of federal law which has not been, but should be, settled by this Court.

We submit that if Rule 18 means what it says, then in cases of this kind when a final judgment has been entered on one separate and distinct claim between the same parties, it is of the utmost importance to the public that this court establish the law as to whether or not the limitations for appeal do not then begin to run, as it seems plain on the face of the rule and on the face of the statute that the limitations would begin to run on the entry of the judgment under the circumstances disclosed in this case.

Other Circuit Courts of Appeal, as set out in petitioner's brief, have held that under these rules an appeal will lie from the final judgment. Now since it is not discretionary as to when a person may take an appeal, but the time is unalterably fixed by statute above cited, it does not appear reasonable or sensible that it will be left up to the litigant on final judgments of this kind for him to determine in his discretion or as he may please, that he can sit around for months and months until other claims have been determined and keep the party in whose favor a final judgment has been entered an undetermined length of time, but as to the particular separate claim on which final judgment has been entered, the party in whose favor the judgment has been entered should be

put at his ease after the time for taking an appeal has elapsed and not be held in court indefinitely on matters in which he is not interested.

Section 225, United States Code Annotated, Title 28, provides for appellate jurisdiction of Circuit Courts of Appeal, and states:

> "The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal, etc., final decisions—
>
> "First in the District Courts in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of the same title."

It would be a travesty on the English language to assert, it seems to us, that the final judgment on Count 2 in this case is not a final decision within the meaning of these statutes and the rules of civil procedure above cited.

We therefore respectfully submit that the Court should grant the writ and settle the point.

CHARLES R. SCOTT,
Barnett National Bank Building,
Jacksonville, Florida,
Counsel for Respondents:

C. P. DICKINSON,
P. O Box 752,
Orlando, Florida,
Of Counsel for Respondents.

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 841.

SUSAN G. REEVES, PETITIONER,

VS.

WILLIAM BEARDALL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF SUSAN J. GRAHAM, DECEASED, RESPONDENT.

BRIEF OF RESPONDENT.

CHARLES P. DICKINSON,
P. O. Box 752, Metcalf Building,
Orlando, Florida,
Attorney for Respondent.

INDEX

Cases Cited

Rules of Civil Procedure Cited

Statutes

Textbook

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 841.

SUSAN G. REEVES, PETITIONER,

VS.

WILLIAM BEARDALL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF SUSAN J. GRAHAM, DECEASED, RESPONDENT.

BRIEF OF RESPONDENT.

STATEMENT.

Petitioner filed suit in the District Court, Orlando Division, Southern District of Florida, on three separate and distinct causes of action in July, 1940.

The first count was on a promissory note pure and simple and separate and distinct from everything else, and was a common law action under the old procedure (Tr. 1).

The second count was for specific performance of a contract alleged to be made between the plaintiff, Susan G. Reeves, petitioner herein, and Susan J. Graham, the deceased, of whose estate the respondent is executor,

wherein it is sought to enforce the provisions of a contract between those parties to let the Will of Susan J. Graham dated May 1, 1931, remain in full force and effect. This is a chancery action under the old procedure and is a separate and distinct cause of action from the first count (Tr. 2).

The third count is brought against a third party, William M. Hamer, and in which third count William Beardall as executor of the Will of Susan J. Graham is also a party, in which the plaintiff as the sole heir and entitled to all of the estate of Susan J. Graham, asks for an accounting against William M. Hamer who, it is claimed, has some of the property of the estate of Susan J. Graham and is strictly a suit for an accounting against Hamer. Beardall is a party to that count only because it is claimed that he is not doing his duty in collecting in the estate. This is a distinct and separate cause of action from the other two and under the old procedure is strictly a chancery action (Tr. 3-6).

The District Court sustained motion to dismiss as to Count Two and allowed amendment (Tr. 30 for Motion to Dismiss and Tr. 34 for Order).

Plaintiff amended Count Two (Tr. 38) and defendant Beardall filed Motion to Strike the amendment and for more definite statement and Motion to Dismiss Count Two (Tr. 41, 42 and 43 respectively). The Court struck the amendment and entered an order dismissing the Petition and a final judgment thereon (Tr. 45, 46 and 47 respectively).

On an appeal to the Circuit Court of Appeals when the case came on for a hearing October 7th, at Atlanta, Georgia, the Court dismissed the cause of its own motion without opinion (Tr. 55).

Plaintiff and Respondent, by counsel, filed petition for re-hearing on October 22, 1941, and this was denied December 5, 1941. Certiorari was granted.

QUESTION INVOLVED.

When a complaint states several separate and distinct causes of action and the final judgment is entered on one in the District Court, is not the aggrieved party entitled to an appeal or required to take an appeal within the statutory time allowed from the judgment on such separate causes of action?

ARGUMENT.

From the brief statement herein, and an examination of parts of the record referred to, there is disclosed three separate and distinct causes of action which, under the old procedure prior to the adoption and effective date of the Federal Rules of Civil Procedure, could not have been combined in any one single action.

These rules have made a radical departure in many particulars and we will refer to those pertinent directly and by analogy.

Rule No. 2 provides:

> "There shall be one form of action to be known as civil action."

And Rule 1 provides that the rule shall govern all procedure in the District Courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in Rule 81.

By Rule 3 an action is commenced by filing a complaint with the Court.

Then we turn to Rule 18 and we find this:

> "(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of crossclaims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied."

These matters are directly on the point.

Further illustration by the rules, we have Rule 20 thus:

> "(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or, in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

Therefore, by virtue of Rule 18 and by virtue of that rule only could the causes of action in this suit have been joined. Then we turn to Rule 54 under the subject of judgment and we find this under B of that rule;

> "(b) Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence, which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

We now turn to the statute on time for making application for appeal or writ of error:

"Section 230. Time for making application for appeal or writ of error. No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree (Mar. 3, 1891, Ch. 517, Sec. 11, 26 Stat. 829; Feb. 13, 1925, Ch. 229, Sec. 8 (c), 43 Stat. 940)."

28 U. S. C. A., Sec. 230.

The Appellate jurisdiction in matters of this kind is covered by the following statute:

"Section 225 (Judicial Code, Sec. 128 amended).

Appellate jurisdiction—

(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

Tit. 28, U. S. C. A., Sec. 225.

Rule 73 of the Rules of Civil Procedure provide for procedure "when an appeal is permitted by law from a District Court to the Circuit Court of Appeals and within the time prescribed, a party may appeal from a judgment by filing with the District Court a notice of appeal."

The time for taking an appeal is mandatory and jurisdictional and cannot be extended by waiver, consent or order of court.

Robertson v. *Morganton Full Fashion Hosiery, Co.*, 95 F. 2d 780.

The rule is so universal we feel it would be an insult to the court to cite authorities for this proposition.

It is noted from the transcript of record in this case, page 55, that the case was dismissed on the ground "that

the appeal sued out in said cause was taken from a judgment that is not final."

When we look at the judgment, transcript 47-48, we find this on top of page 48:

> "It is Ordered and Adjudged that this suit as set out in Count Two of plaintiff's complaint be, and the same is hereby dismissed as to William Beardall as executor of the estate of Susan J. Graham, deceased, and that the plaintiff Susan G. Reeves take nothing by her plaint, and that the defendant William Beardall, as executor of the estate of Susan J. Graham, deceased, as to plaintiff's claim set up in Count Two of her complaint, go hence without day."

Apparently the Circuit Court of Appeals, Fifth Circuit, had in mind its opinion in the case of *Hunteman v. New Orleans Public Service, Inc., et al.*, 119 F. 2d 465, where it dismissed an unlike case where two parties had been sued in the same count on the same cause of action and it dismissed an appeal because the case hadn't been finally disposed of as to the other parties. This case was not brought nor governed by Rules 18 and 54 or any other rules of Civil Procedure as to joinder of parties, cause of actions or the entry of final judgment.

We have referred to Rule 20 by analogy and for the purpose of calling to the court's attention the extensive revoluntionary changes in the procedure, all of which the Court knows. It will be noted that Rule 20 provides that judgment may be given to one or more of the plaintiffs according to their respective rights to relief and against one or more of the defendants according to their liabilities, this taken in connection with Rule 54 quoted above shows a plain intention in the adoption of these rules of Civil Procedure to provide for the hasty ending of independent litigation both as to causes of action and parties in causes of action by providing for just such thing as was done in this case before the court, that is, the entry of a final judgment on a separate and distinct cause of action

as to any party which entirely determines as to all parties interested in the particular final judgment on the particular cause of action that this ends the action as to that particular claim and party or parties, and to appeal is not only allowable but is required to be taken within the ninety days specified in the statute above quoted, Sec. 230, Tit. 28, U. S. C. A.

Otherwise the rules themselves would belie the very purpose expressed in Rule No. 1: They shall be construed to secure the just, speedy and inexpensive determination of every action.

We now come to the meaning of the word judgment as used in Rule 54 and the other Federal Rules.

We find this defined in Rule 54, Subdivision A thus:

> "Judgment as used in these rules includes a decree and any order from which an appeal lies."

Therefore, when we apply this definition to Subdivision B of Rule 54 and we find the provision for the Court to determine as to all the issues material to a particular claim and for the entry of judgment disposing of such claim, and where the rules say the judgment shall terminate the action with respect to the claim so disposed of, then it is perfectly plain that this definition, and the application of same to Subdivision B, clearly brings the appeal in this case to the Circuit Court of Appeals within Sec. 225, Tit. 28, U. S. C. A., quoted above, wherein it is provided for appeals to review "final decisions" as the definition particularly says that it includes any order from which an appeal lies, and certainly the judgment in the case at bar was an order, and a final order, and a final decision of the court as to claim asserted in Count Two.

The definition of the word judgment and as understood in common parlance means a final judgment.

1 Freeman on Judgments, Fifth Edition, Section 2, pages 3, 4, and 5.

Precedence under the rules of civil procedure of course would appear only in the decisions of the Federal Court, including this court and we find nothing from this Court.

In addition to the citations in brief of Petitioner, we find this case:

Karl Kiefer Mach. Co. v. *U. S. Bottlers Machinery Company*, (7th Circuit) 108 F. 2d 469.

This case held that where a suit was filed on two separate claims based on two separate patents and final judgment was entered dismissing as to one of the claims, that this judgment was appealable under Section 128 of the Judicial Code as amended, 28 U. S. C. A. 225, authorizing appeals from final decisions, the Court holding that final decisions mean the same thing as final judgments and decrees. Of course as we understand it citing cases decided by the Circuit Courts of Appeals on this proposition might or might not be precedent, depending on whether or not this Court agrees with the particular decisions.

In this case counsel for respondent was convinced at the time the Circuit Court of Appeals dismissed this action of its own motion that it was in error in doing so, and therefore joined in a petition for rehearing and filed herein on petition for certiorari a brief in support thereof instead of against the granting of same. Counsel for respondent is still of the opinion and belief from the application of the rules of civil procedure as herein set out that the Circuit Court of Appeals was in error in dismissing the action and it is convinced that the decision of the District Court in Count Two was appealable under the statutes and rules of Civil Procedure referred to herein.

This raises a peculiar situation in the matter of taxing costs where the Circuit Court of Appeals has dismissed a case over the protest of parties on both sides. If the Court reverses the case it does not appear appro-

priate to charge the costs to the respondent, nor *vice versa*.

All of which is respectfully submitted.

CHARLES P. DICKINSON,
P. O. Box 752, Metcalf Building,
Orlando, Florida,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 841.—October Term, 1941.

Susan G. Reeves, Petitioner, *vs.* William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 11, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

The sole question presented by this case is whether the Circuit Court of Appeals committed error in dismissing the appeal from the District Court on the ground that the judgment in question was "not final".

The jurisdiction of the District Court was invoked on the basis of diversity of citizenship. The complaint contained three counts. Count I contained a claim on a promissory note executed by respondent's decedent. Count II contained a claim on an alleged contract between petitioner and respondent's decedent whereby the latter agreed not to change her will in consideration of petitioner's return of certain securities and petitioner's agreement not to press for payment of the note. Specific performance or in the alternative damages equal to the net value of the estate was sought. Count III contained a claim against one Hamer who was alleged to hold certain assets of decedent to which petitioner was entitled by reason of the contract on which Count II was based. The prayer was for an accounting against Hamer. Respondent moved to dismiss Counts II and III. The motion was granted with permission to the petitioner to amend. Counts II and III were amended in respects not material here. Respondent then moved to dismiss Count II. Petitioner having announced that she did not desire to amend, the court granted the motion and ordered that "final judgment" be entered on Count II in favor of respondent. An appeal to the Circuit Court of Appeals was dismissed without opinion on the ground that it "was taken from a judgment that is not final". We granted

the petition for certiorari because of an apparent conflict between that decision and such cases from other circuits as *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83.

In this type of case the Circuit Court of Appeals has appellate jurisdiction to review by appeal only "final decisions". Judicial Code § 128, 28 U. S. C. § 225. The Rules of Civil Procedure provide: "When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." Rule 54(b). That rule, the joinder provisions (see Rules 13, 14, 18, 20) and the provision of Rule 42 which permits the court to order a separate trial of any separate claim or issue indicate a "definite policy" (*Collins* v. *Metro-Goldwyn Pictures Corp.*, *supra*, p. 85) to permit the entry of separate judgments where the claims are "entirely distinct". 3 Moore, Federal Practice, Cum. Supp. 1941, p. 96. Such a separate judgment will frequently be a final judgment and appealable, though no disposition has been made of the other claims in the action. *Bowles* v. *Commercial Casualty Ins. Co.*, 107 F. 2d 169, 170. That result promotes the policy of the Rules in expediting appeals from judgments which "terminate the action with respect to the claim so disposed of", though the trial court has not finished with the rest of the litigation. See Federal Rules of Civil Procedure, Proceedings of Institutes, Washington & New York (1938), p. 329.

The Rules make it clear that it is "differing occurrences or transactions, which form the basis of separate units of judicial action." *Atwater* v. *North American Coal Corp.*, 111 F. 2d 125, 126. And see Moore, *op. cit.*, 92-101; 49 Yale L. Journ. 1476. If a judgment has been entered which terminates the action with respect to such a claim, it is final for purposes of appeal under § 128 of the Judicial Code. The judgment here in question meets that test. The claim against respondent on the promissory note

was unrelated to the claim on the contract not to change the will. Those two claims arose out of wholly separate and distinct transactions or engagements. And the question as to Hamer's liability to account to petitioner would arise only in the event that the claim on the contract not to change the will was sustained. Hence no question is presented here as respects the appealability of a judgment dismissing a complaint as to one of several defendants alleged to be jointly liable on the same claim. See *Hunteman* v. *New Orleans Public Service, Inc.*, 119 F. 2d 465. After the entry of the judgment on Count II, the claim based on the contract not to change the will was terminated and could not be affected by any action which the Court might take as respects the remaining claims. Nothing remained to be done except appeal.

The judgment therefore was final.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.